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In the

SUPREME COURT OF THE UNITED STATES

October Term 1980

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BURLINGTON NORTHERN, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 23, 1981

QUESTIONS PRESENTED*

1. Where by statute the Interstate Commerce Commission may authorize a proposed rail merger only when it is consistent with

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* The parties to the consolidated Petitions for Review in the Court of Appeals were: Missouri-Kansas-Texas Railroad Company, Railway Labor Executives' Association, People of the State of Illinois, Illinois Commerce Commission, Patrick W. Simmons, M. S. Stuckey, Board of Trade of Kansas City, Missouri, Inc., Soo Line Railroad Company, petitioners, consolidated petitioners and intervening petitioners below; United States of America, Interstate Commerce Commission, Burlington Northern, Inc., St. Louis-San Francisco Railway Company, respondents and intervening respondents below.

Pursuant to Rule 28.1 Petitioner states that it is a corporation and is a subsidiary of Katy Industries, Inc., which owns 97.77% of the common stock of Petitioner. The following companies are subsidiaries of Petitioner, except wholly owned subsidiaries, with percentage owned indicated: Galveston, Houston & Henderson R.R. (50%); Joplin Union Depot Co. (33.33%); Kansas City Terminal Ry. Co. (8.33%); Terminal R.R. Association of St. Louis (6.25%); Texas City Terminal Ry. Co. (33.33%); Pullman Co. (1.04%); Trailer Train Co. (2.44%). Katy Industries, Inc., Petitioner's parent company, has the following subsidiaries, except wholly owned subsidiaries, with percentage owned indicated: Quality Foods Machinery, Inc. (93%); American Gage & Machine Co. (80%); Simpson Instruments Sales & Services, Inc. (80%).

the public interest and where by statute the Commission must consider, as part of determining consistency with the public interest, the effect of the merger on the adequacy of rail service, did the Court of Appeals err in affirming the Commission's authorization of a proposed merger on the basis that the Commission may first find, and therefore approve, a proposed merger as consistent with the public interest, and then treat as a separate and distinct question whether and to what extent, by reason of the impact of the merger on the adequacy of service by other railroads, the merger should be subject to conditions to protect such service?

2. Where the statute governing rail mergers employs standards of "public interest" and "adequacy" of transportation to the public, and the statute requires as a matter of policy the encouragement of sound economic conditions among carriers, did the

Court of Appeals err in approving what it found to be a new "essential" service standard for determining whether financially weak carriers not parties to the merger are to be protected against admittedly major adverse effects of the merger?

3. Where Petitioner presented substantial evidence that the merger would negatively affect its revenues so that it would be unable to continue to provide adequate service and the Commission found that Petitioner's revenues would be negatively affected to a major degree, did the Court of Appeals err in affirming the Commission's conclusion that Petitioner and its service required no protection when such conclusion was not based on substantial evidence of record?

4. Where the Interstate Commerce Commission announced rule changes without notice and after the close of the proceedings that made Petitioner

procedurally ineligible for relief in those proceedings notwithstanding the merits of its case, did the Court of Appeals err, in conflict with the standards annunciated by this Court and other Courts of Appeals, in finding Petitioner's due process rights had not been violated where there was no showing of any statutory need to justify the retroactive application of the new rules?

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BURLINGTON NORTHERN, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Missouri-Kansas-Texas Railroad ("Katy" or "MKT") respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which affirmed an Order of the Interstate Commerce Commission ("ICC" or "Commission") approving the merger of Burlington Northern, Inc. ("BN") and St. Louis-San Francisco Railway Company ("Frisco").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported: Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392 (5th Cir. 1980). It affirmed an Order of the Commission which is also reported: Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Railway Co., 360 I.C.C. 784 (1980). Both opinions are included in the Appendix to this Petition.[1]

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on November 24, 1980 and this Petition is filed within 90 days

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1. The Appendix to this Petition is cited herein as A ___. The Court of Appeals opinion is at A 1 - A 85, bound together with this Petition; the Commission report and order is at A 86 - A 485, bound in a separate volume.

thereof. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

49 U.S.C. § 10101. Transportation policy.

> (a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes
>
> > (1) to recognize and preserve the inherent advantage of each mode of transportation;
> > (2) to promote safe, adequate, economical, and efficient transportation;
> > (3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
> > (4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination

or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

49 U.S.C. § 11344. Consolidation, Merger, and Acquisition of Control: General Procedure and Conditions of Approval.

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Comission shall hold a public

hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that

> the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Comission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

STATEMENT OF THE CASE

On April 17, 1980 the Commission issued a report and order authorizing the merger of BN and Frisco under 49 U.S.C. § 11344. Katy and others had protested the proposed merger before the Commission on the ground that the merger as proposed did not comply with the statutory prerequisite of being consistent with the public interest. Katy had asked

that the Commission disapprove the proposed merger on the basis that the economic impact of the merger on Katy through the diversion of certain rail traffic to the new merged system would leave Katy, a financially marginal carrier, so weak that it would be unable to continue to provide adequate rail service to those shippers and communities which would continue to depend on Katy after the merger (360 I.C.C. at 864, A 167). Under the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., in determining whether a merger is consistent with the public interest the Commission must consider its effect on the adequacy of transportation service to the public generally, and not just the public to be served by the merging railroads. 49 U.S.C. § 10101, 49 U.S.C. § 11344.

Alternatively, Katy asked that the Commission use its statutory power to impose conditions on the merger so as to make it

consistent with the public interest. See 49 U.S.C. § 11344(c). Specifically Katy asked that it be indemnified by the merged company for any loss in net income resulting from the traffic diverted by the new company to itself from Katy (360 I.C.C. at 865, 872, A 168, A 175). This would have permitted Katy to be financially able to continue to provide adequate rail service to those communities and shippers that would continue to depend on Katy for rail service after the merger. Another condition that Katy could have asked for was inclusion in the merged system. However, the Commission had previously issued a policy statement that it would not grant inclusion in a rail merger if there were any reasonable alternative. Railroad Consolidation Procedures, 359 I.C.C. 195 (1978). Because, as Katy demonstrated, an indemnification formula could be devised that would permit it to be able to continue to provide adequate rail service,

it was ineligible for inclusion under the Commission's announced policy. Also, the Commission has the statutory power to impose any protective condition, whether or not proposed by any protesting party, and, as Katy was aware, the Commission had exercised this power in previous merger cases.[2]

After the close of the proceedings, in its report and order in the BN-Frisco case, the Commission announced two new policy determinations that, notwithstanding any finding as to the public interest of the merger or the need for protective conditions for Katy, made Katy procedurally ineligible for protective conditions. The Commission ruled that it would not impose indemnity under any circumstances (360 I.C.C. at 953, A 256), although it is clear the Commission

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2. See, e.g., United States v. ICC, 396 U.S. 491, 501 (1970) (Northern Lines Merger Cases). (See also 360 I.C.C. at 950, A 253).

has the statutory power to provide indemnity and it has previously done so; and the Commission further ruled that it would not impose any protective condition that had not been requested by the protesting party (360 I.C.C. at 951-52, A 254-55), although again, as above indicated, there is no such statutory limitation. Therefore Katy, notwithstanding the merits of its case and without prior notice, found itself, through the retroactive application of these rules, procedurally ineligible for any relief to which it was substantively and statutorally entitled in the public interest in order to assure the adequacy of its service.

The Commission approved the proposed merger without imposing protective conditions for Katy despite the Commission's findings that traffic diversions resulting from the merger would have a major negative impact on Katy's revenue (360 I.C.C. at 955, A 258). It first ruled that Katy's

requested relief--indemnity--could not be granted because of the Commissioner's new policy against granting indemnity under any circumstances (360 I.C.C. at 952-53, A 255-56). It then "additionally" found that despite the traffic diversions and loss of revenues, in view of Katy's future prospects, Katy's losses would not adversely impact its ability to provide "essential" services (360 I.C.C. at 954, A 257). This finding was based on judgments as to three factors, none of which judgments were supported by substantial evidence of record.[3] One Commissioner, dissenting, concluded that the impact of the admitted loss of revenue would adversely affect Katy's ability to

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3. The three factors were an alleged "potential" increase in coal traffic, a possible reduction in maintenance costs when Katy's rehabilitation program is completed, and a tax benefit agreement between Katy and its parent relating to the latter's reimbursement of Katy in respect of Katy's tax losses (360 I.C.C. at 954-55, A 257-58).

continue to provide essential service and believed that indemnity was a proper protective condition (360 I.C.C. at 963, A 266).

After the Commission issued its Report and Order authorizing the merger, Katy sought review in the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §§ 2321(a) & 2342(5). The Court of Appeals stayed the effectiveness of the order pending disposition of the petition for review and this Court denied BN and Frisco's application to vacate that stay. Burlington Northern, Inc. v. Missouri-Kansas-Texas Railroad Co., Docket No. A-1053, ___ U.S. ___, 48 U.S.L.W. 3820 (June 16, 1980). The Fifth Circuit vacated the stay and affirmed the Order of the Commission on November 21 and 24, 1980 respectively. On November 21, Justice Powell continued the stay pending further order and on November 26 the full Court vacated the stay and denied Katy's request

to stay the order and merger pending this Petition. Missouri-Kansas-Texas Railroad Co. v. United States, Docket No. A-453, ___ U.S. ___ (November 21, 1980), ___ U.S. ___ (November 26, 1980). The merger was immediately consummated.

The merger combines two financially strong carriers into a huge new system. BN, already the largest railroad in the country in miles operated and second largest in revenues (360 I.C.C. at 793, A 96), has operated primarily in the northwestern quadrant of the United States between Chicago and the Pacific coast extending south to Kansas City and St. Louis with a route into Texas through Denver via two subsidiaries, the Colorado and Southern (C&S), and the Fort Worth and Denver (FW&D) (360 I.C.C. at 794, A 97). Frisco, in addition to lines extending east of the Mississippi to Memphis, Birmingham and Pensacola, has operated south of Kansas City and St. Louis reaching points

in Kansas, Oklahoma and Texas as far south as Fort Worth and Dallas (360 I.C.C. at 799, A 102).

Katy is a 2200-mile line of railroad operating in the states of Missouri, Kansas, Oklahoma and Texas between Kansas City and St. Louis on the north and Dallas, Fort Worth, Houston and Galveston on the south (360 I.C.C. at 865, A 168). Thus, Katy has heretofore served as an important end-to-end connection of BN for traffic which BN originates or terminates in the upper Midwest (or handles as a bridge line to and from other railroads) and Katy terminates or originates in its territory (R400).[4] Katy also has handled traffic as a bridge or intermediate line between BN and other carriers, including BN's subsidiary FW&D.[5] Frisco, in

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4. References to the "Certified Copy of the Portions of the Record Relied Upon by the Parties in Their Briefs", filed in the Court of Appeals, are cited as R__.

5. BN's line to Texas through Denver is

this territory, has frequently been a direct competitor of Katy. By reason of the BN-Frisco merger, the Frisco line bridges the gap between BN at Kansas City and FW&D at Fort Worth and Dallas as part of a new single line system running between BN's vast operating territory north of Kansas City and the growing commercial areas of Texas as far south as Houston and Galveston (R18-R19). Thus BN, formerly an end-to-end connection of Katy with which it did not directly compete, has now become a direct competitor of Katy throughout much of Katy's operating territory.

Katy is the railroad most adversely affected by this merger (R551-R552) as confirmed in BN's testimony (R14). The evidence introduced by Katy shows that the

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obviously not a good competitive service route for BN's traffic between the upper Midwest and Chicago (where BN has connections to the East), on the one hand, and Texas, on the other hand (360 I.C.C. at 938, A 241).

impact on Katy's financial well-being is such that it cannot help but seriously impair Katy's ability to provide adequate rail service to those shippers and communities that will continue to rely on Katy for such service after the merger and diversions. Adequate service is dependent on the financial wherewithal to provide it (360 I.C.C. at 937, A 240) and Katy is in weak financial condition, with a long history of negative working capital (360 I.C.C. at 1118-24, A 421-427). Only four months before approving the BN-Frisco merger, the Commission found Katy to be in "very weak financial condition." Adequacy of Railroad Revenue, 362 I.C.C. 198, 324 (1979). The impairment of Katy's remaining service will thus result from the substantial diminution of its already limited funds available to maintain its roadway and related facilities and equipment, to make capital replacement or improvements through purchase of new

equipment or other property, or to repay outstanding indebtedness and the fixed charges thereon (R553). A danger of Katy's bankruptcy is created (R131).

That the merger would have a severe adverse impact on Katy is clear and undisputed; it was conceded by the merger applicants from the outset of the proceedings before the Commission and found by the Commission itself. Pursuant to the Commission's regulations, the applicants submitted evidence of the effects of their proposed merger on other railroads by making a study of their traffic for the year 1976. The applicants themselves estimated that they would divert to their own system a large volume of traffic heretofore moving via Katy, such traffic producing for Katy an estimated $6.5 million of gross revenues annually (R196). The Commission found that Katy would suffer an even greater loss of gross revenues to the merged system, based

on 1976 movements, ranging from $8,600,000 to $8,900,000 annually (360 I.C.C. at 1091, A 394).[6] The Commission found that when the full effect of the merger and diversions had taken place after three years this would mean a loss of $4,530,000 in annual net income to Katy[7] (360 I.C.C. at 1110,

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6. The loss consists of $6.5 to $6.8 million on traffic of Katy interchanged with the merger applicants and $2.1 million on traffic of Katy interchanged with other railroads.

7. The Commission's conclusion as to what amount of gross, and therefore of net, revenue which Katy would lose by reason of the merger was based on evidence of record which assumed that the so-called standard or DT&I traffic conditions for the protection of other roads would be imposed on the merged system as conditions to approval of the merger, without restriction as to time limit. This had been the Commission's unfailing custom for decades in major rail mergers and other unifications (See 360 I.C.C. at 933-34, A 236-37). However, the Commission here, after reaching its conclusions as to Katy's traffic and revenue losses based upon such evidence, determined that the DT&I conditions will be imposed for a period of only two years. There is no evidence of record whatever as to the effect of the lifting of the DT&I conditions after two years on the amount of the diversion of traffic and revenues beyond the amount found

A 413). In view of the fact that Katy's gross revenues for the study year amounted to only $101 million (360 I.C.C. at 1123, A 426), the Commission properly characterized Katy's loss as a "major loss of interline traffic and revenues" (360 I.C.C. at 955, A 258).

ARGUMENT

I

THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S DECISION ON THE BASIS THAT THE COMMISSION COULD APPROVE THE PROPOSED MERGER AS CONSISTENT WITH THE PUBLIC INTEREST SEPARATELY FROM THE STATUTORILY REQUIRED CONSIDERATION OF EFFECT ON ADEQUACY OF RAIL SERVICE OF OTHER RAILROADS

The Court of Appeals made a basic error in its understanding of this case, the issues herein, the position of the parties

by the Commission, and the Commission does not even address this subject in its Report.

and the statutory prerequisites for merger approval when it stated that, "[n]one of the petitioners directly challenge the Commissioner's ultimate conclusion that the BN-Frisco merger is in the public interest." (632 F.2d at 399, A 24). This error tainted its entire analysis of the case. The Court of Appeals apparently thought that there were two issues: one, was the merger consistent with the public interest; and two, had an adequate showing been made for the imposition of conditions to protect the service of other railroads. However, this does not reflect the statutory scheme or the position of Katy before the Commission or the Court of Appeals.

A proposed rail merger is not consistent with the public interest if the continuation of other adequate rail service is harmed thereby. 49 U.S.C. § 10101, 49 U.S.C. § 11344. Soo Line R.R. v. United States, 271 F. Supp. 869, 873 & n.1 (D. Minn.

1967). Katy presented evidence before the Commission that the merger, by causing diversion of traffic from Katy to the merged railroad, would decrease Katy's revenue and income to the point where Katy would be unable to continue to provide adequate rail service to those shippers and communities who would continue to rely on Katy after the merger and diversions. Therefore, Katy protested the merger as not consistent with the public interest as required by statute and argued that it should not be approved as proposed.

However, Katy realized that the Commission is not limited to approving or disapproving a merger as proposed. It has the statutory power to change the terms of the proposed merger or impose conditions thereon so as to make the merger consistent with the public interest and thus be able to be approved. 49 U.S.C. § 11344(c) (See 360 I.C.C. at 950, A 253). Therefore, in

addition to asking that the merger as proposed not be approved, Katy alternatively asked the Commission to condition the merger so as to make it consistent with the public interest and Katy proposed the above described indemnity condition. It has been Katy's position throughout this proceeding that without protective conditions, its ability to continue to provide adequate service after the merger would be seriously adversely affected and that therefore the merger was not consistent with the public interest and could not lawfully be approved.

The Commission is not permitted to determine the public interest separately from the statutory standards therefor; rather, it is required to consider those standards, including the effect of the merger on adequacy of transportation, in determing if the merger is consistent with the public interest and can be approved.

McLean Trucking Co. v. United States, 321 U.S. 67, 76 (1944). In short, the Commission may not, as the Fifth Circuit found it did here, conclude that a merger is consistent with the public interest without considering aspects that could effect its impact. Port of Portland v. United States, 408 U.S. 811, 841 (1972); Missouri P. R.R. v. United States, 346 F. Supp. 1193, 1198 (E.D. Mo. 1972), aff'd, 409 U.S. 1094 (1973). The Court of Appeals' statements to the contrary indicate a change, without precedent or basis, in the statutory scheme for rail merger approval, and its opinion based thereon is in error.

II

THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S NEW "ESSENTIAL SERVICE" STANDARD FOR DETERMINING WHETHER TO PROTECT ADVERSELY AFFECTED RAILROADS

In its administration of the Interstate Commerce Act the Commission is obligated to carry out the National Transportation Policy, set forth in 49 U.S.C. § 10101. That Policy, which is concerned with the provision of "adequate" (as well as safe, economical and efficient) transportation, requires the encouragement of "sound economic conditions in transportation, including sound economic conditions among carriers." (emphasis added). The Act requires the Commission, in determining whether to approve a rail merger, to consider the effect of the merger on the "adequacy" of transportation service to the public and the effect of the merger on other railroads. 49 U.S.C. § 11344.

It has been in keeping with the concern as to "adequacy" of service, and the need to promote "sound economic conditions among carriers" -- including carriers adversely affected by a merger as well as the merger applicants -- that in approving rail mergers the Commission has historically provided protection for adversely affected roads, particularly when roads in a weak financial condition are adversely affected by the merger of financially strong ralroads. In the words of the Commission's own brief before the Court of Appeals in this case, the Commission, prior to the BN-Frisco case, sought to "guard against the destruction of those competitors or the serious curtailment of their capacity to provide service where their survival and the preservation of their service is needed in the public interest." This meant, over the years, the imposition of a large variety of conditions to protect adversely affected railroads, such as

special traffic solicitation arrangements, expansion of such railroads' opportunity for growth through the grant of trackage rights over the lines of the merged company, monetary indemnification against traffic losses, etc. (360 I.C.C. 950, A 253 and cases cited therein).

However, in the BN-Frisco decision, the Commission, while referring to the "adequacy" of transportation test, couched its conclusions as to the effect of the merger on other railroads in terms of their "essential" service, although neither the governing merger statute nor the National Transportation Policy refers at all to "essential" service. It was uncertain from the Commission's Report whether this represented a shift of substance, or whether the Commission was in effect treating "adequate" and "essential" as synonymous. In either event, the Commission made no finding that Katy's services were not "essential".

Before the Court of Appeals the Commission's brief sought to allay any fears that the use of the word "essential" represented a departure from either the statute or precedent. The Fifth Circuit's opinion, however, treats the "essential" service standard as constituting a "new standard" for the weighing of public interest considerations (632 F.2d at 401 n.21. A 31-32). That the Court is right in this regard has been recently confirmed by the Commission's latest statement of policy on rail consolidations, Railroad Consolidation Procedures, General Policy Statement, 363 I.C.C. 784 (January 28, 1981).

Thus, it is now clear that the Commission established in the BN-Frisco case a double standard: merger applicants will have their merger approved so long as the "adequate" transportation service test is met; other railroads, however, will be entitled to no protection unless harm is

shown to their "essential" services. See, e.g., 360 I.C.C. at 935, A 238:

> Adequacy of Transportation
>
> Approval of this merger, as conditioned, will have beneficial effect on the adequacy of transportation to the public. Not only will the services of the merged company be significantly improved, but other railroads will be able to continue providing essential services. [emphasis added]

The significance of this double standard is exemplified by the Commission's treatment of the impact of the merger on financial strength, with its consequent effect on the ability to provide satisfactory transportation service. As the Commission said, in adhering to the "adequacy" standard for the merger applicants, 360 I.C.C. at 937, A 240:

> A function of adequate transportation service to the public is the ability of a railroad to maintain its facilities. BN and Frisco currently do not have, and do not

> anticipate any difficulties in maintaining their facilities. The merged company will present an attractive target for investment. Thus capital should be available to finance necessary improvements to maintain its facilities. [emphasis added]

This conclusion was based on the fact that the merged enterprise, earning over $80 million a year based on the combined results of the merger applicants for the study year 1976 (360 I.C.C. at 997, 1020, A 300, A 323), would achieve additional net income of $33 million annually as a result of the merger (360 I.C.C. at 997, A 300).

In considering the situation of Katy, however, which had a net loss in 1976 and has been chronically in weak financial condition,[8] the Commission has considered a further net loss of $4.53 million a year by

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8. The Fifth Circuit noted that Katy's achievement of positive net income in 1978 was only the second significant income for the railroad in "nearly 75 [sic; i.e. 15] years". (632 F.2d at 397, A 15).

reason of the merger (360 I.C.C. at 1110, A 413) as insufficient to cause harm to Katy's "essential" services.

Although the Commission did not define "essential" service in the BN-Frisco case, its January, 1981 policy statement, 363 I.C.C. at 793, now states:

> A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

While this definition lacks total precision, its intent is clarified by comment of the Commission, 363 I.C.C. at 788, to the following effect:

> We have seen that the bankruptcy, liquidation, or abandonment of lines by a carrier does not necessarily mean the cessation of service to the public. The emergence of short line carriers and community owned or subsidized lines has demonstrated that where there is a demand for a service that service can be provided.

In reality, therefore, the purported provision for protection of "essential" service appears virtually meaningless. Since, in the Commission's view, when service is demanded, service will somehow be provided by someone -- another railroad (including the possibility of a new short-line operation following the bankruptcy of the protestant) government subsidized rail service, or other mode of transportation -- there will be few, if any, cases where a protesting railroad will ever be able to make the requisite showing that "adequate alternative transportation is not available." Contrary to the Commission's brief before the Fifth Circuit, the Commission is indeed departing a long way from its prior concern with the "serious curtailment" of the ability of other railroads to provide needed service and the possible "destruction of those competitors." Rather than seeking to

prevent the destruction of other railroads, the Commission now welcomes their bankruptcy.

Even if one were to assume that this shocking approach might be considered a permissible one for the Congress to adopt, it is not one which the Commission may validly establish under the existing statutory National Transportation Policy which is to promote, not destroy, sound economic conditions among carriers. In its treatment of the "essential" services standard, the Fifth Circuit's opinion fails even to discuss this aspect of the National Transportation Policy.[9] Moreover, the Commission made no finding that the admitted loss to Katy of

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9. The Court's reference (632 F.2d at 400, A 30) to the recent statutory encouragement of rail mergers in the Railroad Revitalization and Regulatory Reform Act (the 4R Act) overlooks the fact that the 4R Act was not intended to affect the standards or case law utilized by the Commission in its review of a merger application. Rept. No. 94-791, 94th Cong. 2d Sess., pp. 174-75.

$8.75 million in gross revenues annually would not adversely affect the "adequacy" of Katy's service.[10] The Court's conclusion that the "new weighing" of public interest considerations is not only permissible, but justifies a result which ignores the need for "sound economic conditions" among railroads adversely affected by the merger, and which ignores the effect of the merger on the "adequacy" of their service, is contrary to law.

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10. The Commission's finding as to the effect of the merger on Katy's "essential" service is discussed in Part III below.

III

THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION WHEN THE KEY FINDINGS SUPPORTING ITS CONCLUSION THAT THE MERGER COULD BE APPROVED WITHOUT PROTECTIVE CONDITIONS FOR KATY WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Conclusion That Protection is Not Necessary Against the Loss of $8.75 Million In Gross Revenues Annually is Not Supported by Substantial Evidence or Adequate Findings

Despite the fact that Katy for many years has been "in very weak financial condition", suffers from a chronic deficit working capital position, and has large amounts of deferred necessary maintenance and capital investment (360 I.C.C. at 1118-20, A 421-23), the Commission assessed Katy's future prospects as "sufficient" to protect its "essential" service from the loss of $8.75 million a year in gross income which the Commission finds

that the merger would inflict. The Commission reaches this conclusion on the basis of three sketchily stated findings: (1) that Katy "potentially" will serve eight coal generating facilities on line, each generating $10 million in additional gross revenues for Katy a year, and that currently three of these units are on line increasing Katy's revenues by $26 million; (2) that Katy's massive rehabilitation program is nearly complete, so that its major expenditures over the past few years will be reduced to normalized maintenance costs; and (3) Katy's parent reimburses Katy for every dollar of Katy's tax loss which the parent uses (360 I.C.C. at 954-55, A 257-58). Despite the speculative nature of these conclusions and the lack of substantial evidence to support them the Court of Appeals affirmed the Commission's findings based on them.

It may be noted at the outset that the Commission's consideration of the coal traffic and rehabilitation program stems from evidence which Katy introduced concerning its ability to continue in operation and provide improved service despite its chronic financial weakness. The evidence shows that, in the absence of mergers of other railroads significantly disrupting Katy's traffic relationships, Katy could probably survive, a matter as to which, understandably, there has been doubt by reason of its long history of deficit operations. The evidence referred to the location on Katy's lines of new coal-fired power plants which would produce new coal business for Katy and the steps being taken by Katy, through a major infusion of Federal funds, to rehabilitate its badly deteriorated properties. The evidence made clear, however, that the losses inflicted by a BN-Frisco merger would dash these hopes completely and result in an

impairment of Katy's service (R326-R328, R534-R552).

(a) **Coal Traffic:** The Commission made no finding as to the net revenue effect of the existing coal traffic in respect of the three units referred to. In any event, Katy's projections as to the adverse impact of the merger on its working capital assumed, in the third year, the benefit of the full amount of $26 million of coal revenues (R147) to which the Commission points, and still Katy's already inadequate working capital would be worsened by $14 million in three years.[11]

Moreover, turning to the matter of five additional potential units, the record shows that neither of two units which may be added

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11. The Commission found Katy's loss of net income would be approximately 75% of that estimated by Katy in its evidence; hence the drop in working capital would also be approximately 75% of that estimated by Katy (See R407, R415, R629, R637 and 360 I.C.C. at 1110, A 413).

to a plant located at LaGrange (Halsted), Texas is expected to be in use before 1985 at the earliest (R148-R149); no contracts for their construction have been made (R657). The evidence as to the remaining three additional units at a plant in Pryor, Oklahoma is equally speculative, that is, that they will be built "sometime in the future" (R128). Thus there is no evidence beyond mere speculation to support the Court's affirmance (632 F.2d at 408, A 61) of the Commission's speculation that this "potential" increase in business will sufficiently protect Katy against the losses which the Commission found Katy would suffer.

Furthermore, whether these five additional units would use coal shipped by rail that would produce the gross revenues referred to by the Commission is even more speculative. The coal used by the three units on line or coming on line in 1981

moves or will move from BN points of origin in Wyoming (R127-R128), and Katy's division of the joint rate on such traffic is based on its haul of such coal from the interchange point to the destinations in Texas and Oklahoma (R127). However, in at least the case of the two additional units which might be built at LaGrange, lignite in Texas might be used instead of coal from BN origins (R127). There is no evidence of record as to whether the movements of coal or lignite would be by rail or some other form of transport such as coal slurry pipelines in which Katy would not even participate.

(b) **Rehabilitation and maintenance costs:** There is no finding by the Commission as to when the anticipated reduction in Katy's rehabilitation costs to normal maintenance costs will occur, and there is no finding as to what would be the amount, if any, of such reduction. While there is evidence in the record that it is hoped that

Katy's main line between Kansas City and Houston will be rehabilitated by 1982 (R121), this is only a goal which may not be accomplished; and there is no evidence of record as to when the additional rehabilitation of Katy's St. Louis line or its various branches and yards will occur. Further, it was expressly testified that the goal of completing rehabilitation of the Kansas City-Houston line by 1982 would not be attained if there were a drastic reduction of funds occurring by reason of the BN-Frisco merger (R132), and all of the rehabilitation is necessary if Katy is to be able to continue to provide adequate service.

Moreover, the statement of the Commission that present costs will be reduced when the rehabilitation is completed in the future takes no account of the mounting inflation in costs of normal maintenance, or of the fact that heavy

loading movements of coal traffic in unit trains on which the Commission relies might substantially increase maintenance costs (R125). The Commission failed to explain in findings adequate to justify upholding its Report as to how and as to what extent the conclusion as to future lower maintenance costs constitutes a "prospect" sufficient, alone or in conjunction with the "prospect" of increased coal revenues, to offset a $4.53 million loss in net income annually;[12]

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12. It must be kept in mind that this figure relates to 1976 traffic, revenue and costs, and it must be assumed that the figure would be significantly higher today as a result of the substantial inflation in costs experienced since then. Between January 1, 1977 and May 23, 1980, the Commission has authorized six general rate increases, which amount in the aggregate to an increase of 31.8%. See Increased Freight Rates and Charges - 1977, ICC Ex Parte No. 336 (1976); Nationwide Increased Freight Rates and Charges - 1977, ICC Ex Parte No. 343 (1977); Increased Freight Rates and Charges, Nationwide - 1979, ICC Ex Parte No. 368 (1979); Increased Freight Rates and Charges - Nationwide - 1980, ICC Ex Parte No. 375 (1980); Increased Freight Rates and Charges, 1978, 359 I.C.C. 821 (1979); and

and there is no evidence of record to support any conclusion that it would.

(c) **Income tax benefits:** The Commission misapprehended the workings of the agreement of Katy's parent company to reimburse Katy in respect of Katy's tax losses. The parent does not reimburse Katy for every dollar of tax loss Katy suffers (other than investment tax credits), but reimburses Katy only to the extent of tax benefit realized by the parent, which at present tax rates does not exceed 46% of the tax loss and the Commission made no finding as to what extent the parent may be able to use the losses in the future so as to be able to benefit from

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Increased Freight Rates and Charges, Nationwide - 8 Percent, 359 I.C.C. 740 (1978). In addition, the Commission has authorized numerous surcharges to overcome rising fuel costs, amounting to a total increase of 7.8%. See, e.g., Effect of Modifying Proclamation No. 3279 and Other Anticipated Energy Conservation Measures on the Operation of Carriers Subject to the Interstate Commerce Act, 350 I.C.C. 563 (1975), and various individual special permissions issued pursuant thereto.

Katy's tax losses. There was no finding as to what the expected amount of such losses will be and, while purporting to assess Katy's future prospects, the Commission makes no effort to assess the future prospects of the parent or the extent to which it may earn taxable income, even though such assessment would appear essential to the Commission's reliance on the use by the parent of Katy's tax losses to offset such income.

The Commission's use of the tax agreement with Katy's parent company as a basis for concluding that Katy's future "prospects" are sufficient to protect it is inappropriate indeed. The agreement was required by the Federal Government as a condition to granting Katy any of the rehabilitation funding which was necessary to overcome years of deferred maintenance in an effort to make its services adequate to the public (R547). Thus the form of protection

which the Federal Government insisted upon as a creditor because Katy's future prospects were not bright enough to justify the loans without that unusual protection is now being considered by the Commission as itself so bright a prospect as to justify denial to Katy of any protection from the major adverse effects of this merger, and to require the public dependent on Katy's service to suffer the results. To consider the stockholder's payment to Katy for the use of Katy's tax losses, which has been agreed to only because a creditor has insisted thereon as a condition to lending Katy any money, as a "bright prospect" for Katy's operations in the future which justifies denial of protection from the ravages of the BN-Frisco merger, is clearly without legal justification.

An administrative agency does not have unlimited discretion in reaching its conclusions. The basis of the

administrative process is that such decisions must be based on substantial evidence of record and that the agency must articulate the reasons for its decisions. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) and cases cited therein. See 5 U.S.C. § 706(2). Here, Katy was denied the relief due it without either of those requirements being met. The Court of Appeals' view that the speculation of the Commission may be regarded as sufficient by the reviewing court because of a general reliance on its expertise and a reservation of power to impose protective conditions later is in error and should be reviewed and reversed by this Court.

B. The Conclusion That the Gross Revenue Loss Would Not Exceed $8.75 Million Annually Is Not Supported by Substantial Evidence

The $8.75 million annual gross revenue loss found by the Commission is premised on the assumption that the DT&I conditions would be imposed on the merged BN-Frisco for the indefinite future, as had been the case in the past. This was made clear, for example, at the outset of the oral argument before the Commission on November 14, 1979 when counsel for the merger applicants stated (R173-R174):

> In the first place when the applicant initiated merger studies in this case, it was necessary to make certain assumptions regarding post-merger operations and one of the assumptions we made was that the DT&I conditions would be applicable. Our operating traffic studies were made on the basis that the DT&I conditions would apply to the post-merger operations.

Katy likewise assumed in its diversion study that the DT&I conditions would be imposed (R406).

That there is no basis in the record for concluding that Katy's gross revenue loss would not exceed $8.75 million in the third and subsequent years following merger is confirmed by the following colloquy in the oral argument before the Commission:

> COMMISSIONER ALEXIS: Are you saying that the traffic studies are predicated on the assumption that the Commission would impose DT&I conditions and you therefore have no information or information that you place value on on traffic diversion which would apply in the absence of these conditions?
>
> MR. LUCENTE [Counsel for the merger applicants]: That is correct, Commissioner. The traffic studies assume DT&I and the operating plan assumes DT&I so for that that reason I suggest that although the questions are comprehensive and probing, it is not possible on this record to get definitive comprehensive answers to those questions.

Nevertheless, the Commission decided, over the objections of two dissenting

Commissioners (360 I.C.C. at 964-65, A 267-68) to impose the DT&I conditions in this case for a period of only two years (360 I.C.C. at 957, A 260). Whatever the merits of the Commission's decision to limit the time period of the DT&I conditions as a matter of policy, the evidence herein is inadequate to support the finding that the maximum loss to Katy will be only $8.75 million a year, in view of the fact that all evidence on the subject of traffic diversion assumed the continuance of the DT&I conditions beyond a two-year period.[13]

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13. The Court's discussion of this subject, (632 F.2d at 404, A 44) reflects an erroneous reading of the record. Contrary to what the Court says in note 30, A 45 the question of Commissioner Alexis related directly to the issue as to whether the evidence of record--the traffic studies to which he referred--was adequate to provide credible information as to the amount of traffic diversion that would occur if the DT&I conditions were not imposed. The flat--and correct--answer of BN's counsel to the effect that there was no such information, because the traffic studies assumed that the DT&I conditions would be imposed, made it

The additional adverse impact on Katy of lifting the conditions might be substantial. In view of the fact that in the study year Katy earned revenues of $13.1 million on traffic interchanged with applicants, of which the Commission has found that $6.65 million would be diverted from Katy on the basis of evidence that assumed the continuation of the DT&I conditions, it follows that some portion of the remaining $6.45 million might be diverted as a result of the lifting of the DT&I conditions. There is no evidence of record, however, as to how much of that $6.45 million would be lost, and there is no finding by the Commission in this respect.

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unnecessary for counsel for the protesting railroads to make the same statement; it was already obvious from the statement of BN's counsel that any decision not to impose the DT&I conditions (or to impose them for only a period of two years) would "undermine other evidence," i.e. the sufficiency of the evidence of the traffic studies as to the effects of the merger once the DT&I conditions were lifted.

The Court of Appeals explicitly recognized that the Commission's evidence and projections are "completely unreliable" if substantial additional diversion occurs in or after the third year following the merger (632 F.2d at 405, A 52). However, it justified affirmance of the Commission's decision on the ground that "the Commission remains completely in control whether" such additional diversion occurs (632 F.2d at 406, A 56).[14] This is based on the Commission's reservation of jurisdiction to

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14. The suggestions of the Commission -- which the Court accepted at face value -- that other railroads may protect themselves by appropriate "responses" to the formation of the BN-Frisco system are worthless. The Commission, for example, exhorted other railroads to "develop new interline rates and services to meet the new competitive abilities of a merged BN-Frisco" (360 I.C.C. at 944, A 247). That this is hogwash is demonstrated by the Commission's own reasons for supporting this very merger: i.e., that BN and Frisco needed to combine because as separate carriers operating interline service they could not provide the benefits of single line service (360 I.C.C. at 936-37, A 239-40).

extend the DT&I conditions beyond two years if circumstances justify. The reservation, however, is essentially meaningless. As the Court itself notes, the Commission has instituted a proceeding looking to the elimination of DT&I conditions in all past proceedings, including BN-Frisco, which suggests the strong likelihood of their being eliminated even before the expiration of two years. If this occurs, the reliability of the Commission's evidence as to the first two years following merger, on which the Court's opinion depends, will obviously cease.

On the other hand, if the DT&I conditions remain in effect for the full two year period, the Court is wrong in suggesting that Katy is protected by having the opportunity to show "actual facts" to justify extension of the DT&I conditions. By hypothesis, the "actual facts" of additional diversion resulting from a lifting of the

DT&I conditions cannot be shown until after they are lifted, and the consequences thereof can be demonstrated. By that time, of course, the additional losses will have been suffered but any "protection" that may be imposed will be for the future following that demonstration; in other words, there will be no protection against the losses in fact shown.[15]

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15. The Court's conclusion (632 F.2d at 406, n.36, A 54) that 49 U.S.C. § 10705(d) furnishes Katy with "substantial safeguards" against diversion which the DT&I conditions would otherwise protect against is similarly erroneous. That statutory remedy would require separate Commission proceedings to challenge each rate or route cancellation which the merged company might make, and a separate finding as to the consistency with the public interest of each cancellation. There are literally thousands of routes and rates to which Katy is a party; and it is therefore doubtful that in the case of any particular rate or route there would be a sufficiently significant impact on Katy to justify denial of the cancellation. It is only through the cumulative effect of the DT&I conditions that adequate protection is provided.

While the Court concluded, but only with the aid of its "strongest bifocals" (632 F.2d at 407, n.38, A 58), that there was compliance with administrative law requirements in the Commission's handling of this question, we submit that the Court's rationalization of the result falls far short of supplying legal justification for the Commission's transparent error in failing even to consider whether Katy's future prospects are "sufficient to protect it" against a loss in gross revenue that may reach not merely $8.75 million but possibly as much as $15.2 million a year. The failure of both the Commission and the Court of Appeals to require any evidence to support the findings on which the merger is based should be reviewed and reversed by this Court.

IV

THE COURT OF APPEALS, IN CONFLICT WITH THE STANDARDS ANNUNCIATED BY THIS COURT AND OTHER COURTS OF APPEALS, ERRED IN HOLDING THAT THE COMMISSION'S ADOPTION AND RETROACTIVE APPLICATION OF NEW POLICIES WITHOUT WARNING DID NOT VIOLATE KATY'S RIGHT OF PROCEDURAL DUE PROCESS

Katy, believing the merger would do Katy and its service great harm, formulated a proposed indemnity condition, and stated that this was the only condition, short of inclusion, which would fully protect it. Accordingly, it advanced no other proposal for a protective condition. The Commission's new policies against indemnification under any circumstances and of not imposing any condition unless requested by the protestant left Katy in the position where, for procedural reasons alone, it could not obtain any relief.

The power of the Commission to promulgate and enforce these new rules is

not questioned herein. What is contested is the Commission's power to announce such rules and then apply them retroactively in the same proceeding so as to deny Katy the relief due it. At least since SEC v. Chenery Corp., 332 U.S. 194, 203 (1947), this Court has encouraged administrative agencies to use the formal rule making process to promulgate general rules of prospective application and it has warned them to announce rules in adjudicatory proceedings and apply them retroactively only when necessary to protect the statutory scheme they are administering. See also Arizona Grocery Co. v. Atchison T.&S.F. Ry., 284 U.S. 370 (1932). The basic consideration in whether a court should allow an agency to apply a rule retroactively is the same as governs retroactive application of legislative statutes -- basic fairness -- except agencies are given less leeway and deference.

The Court of Appeals for the District of Columbia Circuit, in a widely followed opinion, has recently listed the considerations as to whether an administrative rule should be given retroactive effect:

> Among the considerations that enter into a resolution of the probelem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party and (5) the statutory interest in applying the new rule despite the reliance of a party on the old standard.

Retail, Wholesale and Department Stores Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).[16] Here, all of these factors weigh

16. Accord, Lodges 743 and 1746, International Association of Machinists v. United Aircraft Corp., 534 F.2d 422, 452-53 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976); Maceren v. District Director, 509

heavily against a retroactive application of the Commission's new rules: it is not an area of first impression where the Commission was forced to act without prior warning, it had acted in similar situations in the past; it is an abrupt departure from well settled practice, the Commission has often awarded a type of relief other than that requested and has provided for indemnity in previous cases, including provision on its own initiative; Katy relied heavily on the old rules, it would not have asked only for a type of relief the Commission would not grant if it knew by so asking it would not receive any relief; the heavy burden on Katy, denial of any protection

F.2d 934, 939-40 (9th Cir. 1974); Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1063-65 (Em. Ct. App. 1979). Cf. Transwestern Pipeline Co. v. Federal Energy Regulatory Commission, 626 F.2d 1266, 1271 (5th Cir. 1980) (Fifth Circuit citing SEC v. Chenery, supra, and Retail, W. & D.S. Union v. NLRB, supra, in approving a non-retroactive application of agency order).

against the merger impact, is obvious; and there is no statutory interest in the Commission choosing not to use powers given to it by Congress. In fact, the overriding consideration required to warrant retroactive application as set forth by this Court in SEC v. Chenery, supra, 332 U.S. at 203 - the need to insure a result consistent with the statutory design or legal and equitable principles -- is totally lacking in the Commission's retroactive application of its new rules. By ignoring these standards here the Fifth Circuit is in conflict with this Court and with the other Courts of Appeals concerning this important issue of administrative review.

The Court of Appeals concluded that these facts did not constitute a denial of due process essentially on three grounds (632 F.2d at 409-10, A 70-72), none of which is sound. First, it referred to the Commission's finding that no protection was

needed.[17] Clearly, however, this finding was made only in the context of the Commission's denial of relief because what Katy sought was the now-forbidden indemnification.[18] It is evident from another finding in the case that if Katy had requested lesser relief, in a different form than indemnity, the Commission might well have granted such relief. We refer to the Commission's approval of a condition for the benefit of the Chicago and Northwestern Company (CNW) (360 I.C.C. at 958, A 26). CNW is a substantially larger railroad than MKT ($529 million in operating revenues in 1976, the study year, compared with MKT's $101 million in operating revenues; 360

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17. As shown in Part III, this finding is not supported by substantial evidence.

18. The Commission stated first that the relief sought was indemnity which would not be granted as a matter of policy; it only then went on to say that, "additionally", protection is not required (360 I.C.C. at 954, A 257).

I.C.C. at 1116, 1123, A 419, A 426). CNW was projected by the Commission to suffer only a $1.7 million loss in net income as a result of the merger as against a $4.53 million net loss for Katy (360 I.C.C. at 1110, A 413). CNW appears in no weaker financial condition than Katy (360 I.C.C. at 1111-1124, A 414-27). Nevertheless, in CNW's case the Commission approved a grant of trackage rights to CNW over the BN's route, saving CNW the expense of rehabilitation of its own routes, and thus benefitting CNW and its service.[19]

There is, of course, no way of knowing on the basis of the record whether a condition less protective than full indemnity that Katy might have formulated would have

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19. While the merger applicants agreed to this condition, it does not appear that the condition was imposed for that reason. Conditions for other roads agreed to by the merger applicants were not imposed (360 I.C.C. at 957, A 260).

been approved by the Commission. But it certainly is unreasonable to conclude, particularly in the light of the condition imposed for CNW's protection, that because the Commission found Katy to have shown insufficient need for indemnity protection, no condition whatever would have been imposed had Katy been advised that indemnity was "out of bounds" and, accordingly, had proposed another form of protection.

The second basis for the Court of Appeals' decision has, if anything, even less merit. It finds Katy's reliance upon receiving indemnity "grossly misplaced" because it had only been imposed in two cases. The facts are, however, that both cases are of recent vintage, and in the more recent of them the protection had been granted to Katy itself, while no case at all denying indemnity is cited by the Court of Appeals; and, as the Court of Appeals had been informed, the Commission while adopting

a new policy against inclusion of an adversely affected railroad had kept entirely silent on the subject of indemnification at a time when it knew that Katy, and others,[20] in the BN-Frisco merger proceedings were seeking indemnification.[21] The Commission's silence on the subject of indemnity led (more properly, misled) Katy into believing that indemnity would be

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20. In addition to Katy, the Rock Island and the Milwaukee railroads requested indemnity (360 I.C.C. at 953-55, A 256-58).

21. A policy against inclusion, if there were any "reasonable alternative", was adopted in December, 1978. Railroad Consolidation Procedures, 359 I.C.C. 195 (1978), after having been proposed on February 1, 1978 in the Rail Merger Study (Final Report) of the Commission's Rail Services Planning Office. Pursuant to a procedural order in the BN-Frisco case served April 6, 1978, Katy was required to file its proposed conditions initially by April 27, 1978 and in final form by May 27, 1978. In neither of its releases in February or December, 1978, did the Commission indicate either that it would outlaw indemnity or that it would never impose any condition not specifically requested by a protestant.

regarded as a "reasonable alternative" to inclusion.

Finally, the Court of Appeals states that Katy can avoid any substantial adverse consequences by petitioning the Commission to provide protective relief "should the future show that the Commission's judgment was wrong" (632 F.2d at 410, A 71). However, as we have shown in our discussion of the CNW condition, it is doubtful that the Commission really determined that no protection of any kind would be justified if protection other than indemnity had been sought. Furthermore, the Commission has recognized that the reopening of a merger case to achieve protective conditions require "protracted proceedings before the I.C.C. during which period the protection sought to be afforded has ordinarily been lost". Chicago & N.W. Ry. - Control - Chicago, R.I. & P.R.R., 347 I.C.C. 556, 633-37 (1974). See Erie Lackawanna Ry.

v. Penn Central, 338 I.C.C. 513, 537-45 (1969) for an illustration of these difficulties. The Court of Appeals' conclusion is tantamount to holding that locking the barn after the horse is stolen constitutes adequate relief. Such a conclusion is in disregard of this Court's holding in Baltimore & O.R. Co. v. United States, 386 U.S. 372, 390 (1967), that the public interest in the assurance of adequate service requires that needed protection be provided before the harm resulting from a merger occurs. Katy submits due process was denied herein.

CONCLUSION

The Court of Appeals' opinion represents a radical change in rail merger law. It is a change without statutory basis and in disregard of the National Transportation Policy. Whereas the governing statute is concerned with the "adequacy" of

transportation service and the encouragement of "sound economic conditions among carriers", now a new "test" as to "essential" service has been introduced which is apparently designed in disregard of the need for sound economic conditions among carriers not parties to the merger, and to make meaningless the "adequacy" test insofar as the effect of a merger on other railroads is concerned. Moreover, the Commission has applied its new test to circumstances where its findings as to lack of need of another road for protection of its service are unsupported by substantial evidence, and where, furthermore, the Commission has adopted new policies that have denied such other roads procedural due process.

Because of its importance to the National Transportation Policy and the nation as a whole, the opinion of the Court of Appeals should be reviewed by this Court. This Petition for a Writ of Certiorari should be granted and, upon review, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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February 23, 1981

APPENDIX

MISSOURI-KANSAS-TEXAS
RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES of America and
Interstate Commerce Commission,
Respondent.

RAILWAY LABOR EXECUTIVES'
ASSOCIATION, Petitioner,

v.

UNITED STATES of America and
Interstate Commerce Commission,
Respondents.

PEOPLE OF the STATE OF ILLINOIS,
Illinois Commerce Commission, Patrick
W. Simmons and M. S. Stuckey, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
and United States of America,
Respondents.

Nos. 80-1523, 80-1563 and 80-1692.

United States Court of Appeals,
Fifth Circuit.

Nov. 24, 1980.

Petitions for Review of an Order of the Interstate Commerce Commission.

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

In late 1977 Burlington Northern, Inc. (BN) and the St. Louis-San Francisco Railway Company (Frisco) applied to the Interstate Commerce Commission (ICC or the Commission) for authorization to merge pursuant to 49 U.S.C. §§ 11343 and 11344.[1] The Commission

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1. Section 11343 states, in pertinent part:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may be carried out only with the approval and authorization of the Commission:
>
> (1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

Section 11344 states, in pertinent

authorized the merger in a decision rendered

part:

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. . . .

(b) In a proceeding under this section, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. . . . When a rail

in March 1980. No party to the proceeding sought administrative review. Instead, several of the protesting parties filed petitions in this court for judicial review of the Commission's decision,[2] and BN and Frisco intervened as respondents. The appellants challenge the Commission's standard of the "public interest," the existence of substantial evidence supporting certain

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carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

2. The Missouri-Kansas-Texas Railroad Company and the Railway Labor Executives' Association filed the original petition for review. The Soo Line Railroad Company and the Kansas City Board of Trade intervened as petitioners. A group of parties, to be designated as the "Illinois parties" herein, also jointly intervened: the People of the State of Illinois; the Illinois Commerce Commission; Patrick W. Simmons, Illinois Legislative Director of the United Transportation Union; and M. S. Stuckey, General Chairman for the United Transportation Union of Illinois Central Gulf Railroad.

projections, two new policy announcements, and a statutory interpretation regarding the scope of required employee protection. We have stayed the merger pending appeal, but we now affirm the Commission's decision.

I. Statutory Provisions for Railroad Mergers

The Interstate Commerce Act (ICA or the Act) requires that the merger of railroads subject to the jurisdiction of the ICC may be accomplished only with the approval and authorization of the Commission. 49 U.S.C. § 11343. The Act's single and essential standard of approval is that the Commission find the merger to be "consistent with the public interest." 49 U.S.C. § 11344(c). The Commission is required to consider at least the following factors in a merger approval proceeding:

(1) the effect of the proposed transaction on the adequacy

of transportation to the public.

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

49 U.S.C. § 11344(b).

The Commission must also consider as an element of "the public interest" the anti-competitive effects of a proposed merger, because § 11343[3] of the Act exempts

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3. Section 11343 was originally § 5(11) of

transactions approved by the Commission from the antitrust laws. United States v. ICC, 396 U.S. 491, 504, 90 S. Ct. 708, 714, 24 L.Ed.2d 700 (1970). When the Commission finds that a merger meets the "public interest" standard, it must approve the transaction. The Commission may, however, impose any conditions upon the merger that it wishes. 49 U.S.C. § 11344(c). These conditions may effectively re-distribute the merger's benefits to bring it within the public interest or enhance the degree to which the public interest is served, consistent with the relevant requirements of the Act.

The flexible procedure and standard that Congress provided in §§ 11343 and 11344 of the Act allow the Commission to adapt its policies and practices to the ever-changing

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the Act, which was recodified by Pub. L. No. 95-473, 92 Stat. 1337 (enacted October 17, 1978).

transportation needs of the public. But Congress has also enacted broad policy guidelines for the Commission, which it is required to consider in its task of identifying the public interest. McLean Trucking Co. v. United States, 321 U.S. 67, 82, 64 S. Ct. 370, 378, 88 L.Ed. 544 (1944). One is the national transportation policy, which says, in part:

> . . . [I]t is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes--
>
> (1) to recognize and preserve the inherent advantage of each mode of transportation;
>
> (2) to promote safe, adequate, economical, and efficient transportation;
>
> (3) to encourage sound economic conditions in transportation,

including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

49 U.S.C. § 10101. Congress provided another policy guideline in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), in which Congress declared its purpose to encourage "efforts to restructure the [railway system of the United States] on a more economically justified basis . . . ." 45 U.S.C. § 801.

The legislative history of the 4R Act specifically states that it is "intended to encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system." S. Rep. No. 94-499, 94th Cong., 1st Sess. 20 (1975), Section 101(a)(2) and 101(b)(2), U.S. Code Cong. & Admin. News 1976, pp. 14, 34. Within these statutory standards and policies set forth by Congress, it is the unique task of the Commission to identify the specific factors, and their proper balance, that best serve the public interest as it changes through the years.4

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4. The Commission has chosen to announce the criteria, other than those set out by Congress, that it currently considers in determining whether a proposed railroad merger satisfies the public interest standard:

(1) Whether essential rail services will continue to be provided, either by the consolidating companies or by other railroads which may be affected by the consolidation ("essential services" include,

but are not limited to, those required by the national defense and those shown necessary to achieve other established national goals, such as energy conservation and rural and community development);

(2) Whether opportunities to achieve operating efficiencies will be increased;

(3) Whether redundant facilities will be eliminated;

(4) Whether the ability of the consolidated system to attract new business will be enhanced;

(5) Whether the consolidated company will be financially viable;

(6) Whether effective inter-and intramodal competition will be maintained wherever economic realities make it possible; and

(7) Whether there will by any adverse impact on the environment of the region served.

Railroad Consolidation Procedures, 359 I.C.C. 195, 199 (1978).

II. Parties to the Commission Proceeding and this Appeal

Because the parties before the Commission and before us are numerous, we will briefly identify them and the roles they play.

A. The Merging Railroads

Burlington Northern is a diversified transportation and natural resources company that is the largest railroad system in the United States in terms of miles, and the second largest in terms of transportation revenues. The principal lines of BN's 25,000 mile system extend east from Seattle and Portland to Montana, where two branches continue to Chicago. Through two subsidiaries, BN also serves Denver, Dallas-Fort Worth, and Galveston. Since 1970 BN has compiled a good traffic and revenue growth

record. Net railway revenues in 1976[5] were about $72.6 million. Frisco, the railroad to be absorbed into BN, has about one-fifth the track mileage of BN. Operating mainly as a link between other carriers, Frisco provides service from St. Louis and Kansas City to Wichita, Memphis, Birmingham, and Pensacola. It also runs from Springfield, Illinois through Kansas and Oklahoma to Dallas-Forth Worth. Frisco connects with BN subsidiaries at four points in Texas: Dallas, Forth Worth, Irving and Quanah. Frisco's net income in 1976 was $12 million.

Because BN and Frisco are not competitors on parallel routes, their proposed merger is of an "end-to-end" form, greatly extending for both railroads the markets

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5. Comparisons of railroad revenues will be based on 1976 figures, the most recent year available at the time data was assembled for the ICC in 1977 and 1978.

they can reach, for which they may then offer more efficient service and lower "single-line" rates. Other operating efficiencies and innovations made possible by the merger would enable the merged railroad to achieve net revenue gains of about $33 million a year, including traffic diversions from competitors of about $16.8 million.

B. Protesting Railroads and Other Parties

The railroad that will probably face the greatest challenge in dealing with increased competition from the merged BN-Frisco is the Missouri-Kansas-Texas Railroad Company (Katy). Katy serves Missouri, Kansas, Oklahoma, and Texas, with its main lines running south from Kansas City and St. Louis through Dallas-Fort Worth to San Antonio and Houston. Katy's traffic volume and operations have changed little since the

1950's, and its net income of $2.4 million in 1978 was only the second significant income for the railroad in nearly 75 years. Katy acknowledges, however, that it has begun to "turn the corner" as a result of improving business in its territory and a substantial rehabilitation of its facilities aided by $38 million in federal funds.

The Soo Line Railroad Company (Soo) operates 4,600 miles of railroad in Montana, North and South Dakota, Minnesota, Michigan, Wisconsin, and Illinois. These routes place Soo in direct competition with BN. Soo is an economically strong carrier, and had a net income of almost $19 million in 1976.

The non-carrier appellants are as follows: (1) the Railway Labor Executives' Association (RLEA), a voluntary, unincorporated association of the chief executive officers of most of the nation's rail labor organizations; (2) the Kansas City Board of Trade (KCBOT); and (3) a group of joint

intervenors representing Illinois interests (Illinois parties).[6]

III. I.C.C. Proceedings and Opinion

BN and Frisco filed their merger proposal with the ICC in late December 1977. The Commission accepted the filing in January 1978 and waived an initial decision by the administrative law judge. 43 F.R. 3799 (1978). Thus the merits of the applications were determined by the Commission itself, as provided by statute when an application "is of major transportation importance." 49 U.S.C. § 11345(e).

Public hearings were conducted before an administrative law judge from May 1978 through June 1979. In October 1979 the administrative law judge closed the record and certified it to the ICC. The Commission heard oral argument on November 14, 1979.

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6. The Illinois parties are identified in note 2.

The total record reflects 46 days of hearings and comprises 8,370 pages of transcript and 222 exhibits received in evidence.

The Commission released its opinion on April 17, 1980, authorizing the merger subject to specified conditions. Burlington Northern, Inc.--Control and Merger--St. Louis--San Francisco Ry. Co., 360 I.C.C. 784 (1980). Because the opinion is the essential subject of this judicial review, it is necessary to outline its contents in some detail.

The Commission first discussed the two applicant railroads and the terms of the proposed merger. The opinion set out the impact and benefits of the merger as projected by the applicants in each of ten major areas: diversion of traffic and revenues from other carriers, increased costs, changes in operations, savings in purchasing and materials, benefits to shippers and the

general public, securities transactions, impact upon employees of the applicants, impact upon national defense, overall financial consequences, and environmental impact. 360 I.C.C. at 805-32, 945-46. These analyses were based upon extensive data that the Commission requires all merger applicants to prepare. 49 C.F.R. §§ 1111.1-.3.

The Commission next analyzed in detail the positions of all other parties to the proceeding. Ten competitor railroads of BN and Frisco had negotiated protective conditions with the merger applicants and informed the Commission that they would not oppose the merger if the stipulated conditions were imposed. In addition to Katy and Soo, four other railroads opposed the merger,[7] but these four carriers chose not

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7. The four railroads were the Chicago, Rock Island and Pacific Railroad Company; the Chicago, Milwaukee, St. Paul and Pacific

to appeal the Commission's decision to this court. The remaining parties opposed to the merger were the RLEA and the KCBOT--both petitioners in this appeal--and six other public and private parties who did not join the appeal.[8]

The two most significant non-carrier parties in favor of the merger were the Department of Defense and the Department of Justice. The Department of Justice stated that it found no significant anticompetitive effects from the merger, based upon the extensive analysis of projected traffic and revenue diversions. The Department noted that all of the competitor railroads could

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Railroad Company; the Illinois Central Gulf Railroad Company; and the Denver and Rio Grande Western Railroad Company.

8. These public and private parties were the Iowa Department of Transportation, the Illinois Department of Transportation, the Montana Wheat Research and Marketing Committee, John W. O'Neil (representing Frisco shareholders), the United Transportation Union, and the Railway Employees' Department of the AFL-CIO.

survive the diversions without serious damage to their operations or financial stability, with the possible exception of Katy. The Department concluded, with a marked lack of sentimentality, that Katy could restructure if it did not survive and, in any event, Katy's presence would not be missed in the competitive climate of its service areas. 360 I.C.C. at 917-20.

Having closely reviewed and analyzed the positions of all the parties, the Commission reviewed the criteria of merger approval contained in the relevant statutes and in the Commission's own policy statements.9 The opinion then analyzed specific findings and conclusions about the benefits to the public from the proposed merger. The Commission found that the BN-Frisco merger was very strongly in the public interest.

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9. See the discussion set out in section 1, above.

The merged BN-Frisco will be able to provide a new single-line service between the Southeast and Northwest, reduce transit times, provide more frequent and efficient service, and greatly improve car utilization. The improved service will stimulate innovative rates and service improvements among other carriers. No competing carrier will be so adversely affected that it could not continue to provide "essential services" to the public. 360 I.C.C. at 934-41.

Katy, Soo, and the four other protesting carriers had asked the Commission to impose special protective conditions on the merger that would relieve them from the impact of the increased competition or improve their competitive position.[10] The Commission

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10. Soo, for instance, made extensive requests for the opening of new connections with the merged BN-Frisco, new trackage rights over BN-Frisco tracks without payment of any rent by Soo, termination of a 1929

denied all requests for special protective conditions, but did impose on the merger for a period of two years the set of standard traffic protection conditions, known as "D.T. & I conditions,"[11] that have been imposed on nearly every railroad merger in the last 30 years. The D.T. & I. conditions generally ensure that a merged railroad will (1) continue to handle the interconnecting traffic of other railroads with the same neutrality as before the merger and not favor its new partner at the expense of a non-merged railroad, and (2) not close routes or rates previously maintained with a competing railroad without the Commission's approval.[12] The Commission also imposed

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pooling agreement between Soo and BN's predecessor company, and six other special conditions.

11. The name is taken from the first case in which the Commission imposed this set of protective conditions, Detroit, Toledo & Ironton R.R. Co.-Control, 275 I.C.C. 455 (1950).

12. The D.T. & I. conditions prohibit both

upon BN and Frisco for two years the conditions that they had negotiated and stipulated with the ten non-objecting railroads. 360 I.C.C. at 950-58, 1179-80.

The order approving the merger subject to these conditions was to become effective 30 days from the date of its service. BN and Frisco announced their intention to consummate the merger on May 19, 1980. Katy and the RLEA, subsequently joined by the other petitioners, sought review in this court and asked the Commission to stay its order pending judicial review. The Commission refused. This court imposed a stay, however, and set the case for expedited briefing and argument. Petitions by BN and Frisco to vacate the stay were

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direct and "commercial" closing of routes and rates. For instance, if carrier A negotiates an interline rate with carrier B, and then carrier A and carrier C merge, A and C cannot close B's interline rate, nor can they offer a lower rate (a "commercial closing") without offering the same rate to carrier B or gaining Commission approval.

denied by this court and by the United States Supreme Court. Burlington Northern, Inc. v. Missouri-Kansas-Texas Railroad, ____ U.S. ____, 100 S. Ct. 3007, 65 L.Ed.2d 1110 (1980).

IV. Issues on Appeal

None of the petitioners directly challenge the Commission's ultimate conclusion that the BN-Frisco merger is in the public interest. The validity of that conclusion is threatened only indirectly, by challenges to subsidiary findings, conclusions, and orders of the Commission. The six issues raised by the parties are as follows:

1) Did the Commission apply a proper statutory standard in looking to the preservation of "essential rail services" rather than the preservation of corporate entities?

2) Did the Commission's limitation of D.T. & I. conditions to two years nullify

the substantial evidence supporting any other finding or conclusion?

3) Did the Commission err in denying the special protective conditions sought by Katy and Soo?

4) Was it arbitrary and capricious and an abuse of discretion for the Commission to announce and apply in this case its new policy determination that (1) indemnification of competitor railroads is not a viable condition "under any circumstances" and (2) a carrier will not be granted any protective condition that it did not request?

5) Did the Commission give adequate consideration to the anticompetitive effects of the merger, especially in encouraging other mergers?

6) Did the Commission properly hold that the Interstate Commerce Act only requires it to consider protection for employees of the

merging carriers, and not for employees of other carriers?

V. The Standard of Judicial Review

The Administrative Procedure Act, 5 U.S.C. § 706, governs the scope of our review of an agency decision. We are directed to

> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or]
>
> (E) unsupported by substantial evidence . . . ."

"Substantial evidence" means "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Illinois Central Railroad v. Norfolk & Western Railway, 385 U.S. 57, 66, 87 S. Ct. 255, 260, 17 L.Ed.2d 162 (1966).

The APA and the Interstate Commerce Act are integral parts of a congressional intent that the Commission use its extensive facilities, broad experience, and expert judgment to make the complex decisions necessary to evaluate whether a railroad merger is consistent with the public interest. It is not our task to re-weigh the evidence or to draw our own inferences from the evidence before the Commission. Chicago, St. Paul, Minneapolis & Omaha Railway v. United States 322 U.S. 1, 3, 64 S. Ct. 842, 843, 88 L.Ed. 1093 (1944). We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole. McLean Trucking Co., 321 U.S. at 87-88, 64 S. Ct. at 381. If a Commission

action meets these broad standards, then our task is at an end.

VI. Discussion of the Issues Raised

1. The "Essential Services" Standard

The Commission's fundamental task under § 11344 is to decide whether a merger is "consistent with the public interest." One of the most difficult decisions of the Commission is the degree to which the benefits for the merging railroads should be diminished through the device of protective conditions in order to insulate weaker competitors. In prior years the Commission believed that the preservation of service in general, and of the corporations providing that service in particular, was an end that justified protective conditions for weaker carriers. Consequently, the Commission would impose conditions on a merger merely

to protect the market shares of competing carriers,[13] to compensate a carrier for anticipated losses,[14] to improve the position of a carrier,[15] or to aid carriers even though they were not likely to be harmed by the subject merger.[16]

The Commission has begun to move away from this liberal use of protective conditions, perhaps in response to the growing public consensus that the transportation industry should be shaped more by the realities of the marketplace and less by government regulation-as shown by recent

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13. See, e.g., Chicago & North Western Ry. -Control-Chicago, Rock Island & Pacific R.R., 347 I.C.C. 556 (1974); Illinois Central Gulf R.R.-Acquisition-Gulf, Mobile & Ohio R.R., Illinois Central R.R., 338 I.C.C. 805 (1971); Pennsylvania R.R., 327 I.C.C. 475 (1966).

14. Chicago & North Western Ry., 347 I.C.C. 556 (1974).

15. Great Northern Pac.-Merger-Great Northern, 331 I.C.C. 228, 280-81 (1967).

16. Louisville & N.R.R.-Merger-Monon Railroad, 338 I.C.C. 134 (1970).

congressional deregulation of the airline,[17] trucking,[18] and railroad industries.[19] The Commission's re-evaluation of policy began as early as February 1977, when the Commission directed its Rail Services Planning Office (RSPO) to conduct a nation-wide study of railroad mergers, prompted by a recognition that 4R Act had expressed Congress' intent to encourage railroad consolidation.[20]

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17. Airline Deregulation Act of 1978, Pub.L.No. 95-504, 92 Stat. 1705 (1978).

18. Motor Carrier Act of 1980, Pub. L.No. 96-296, 94 Stat. 793 (1980).

19. Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895 (1980).

> We have reviewed the present case under existing law prior to the October 1, 1980 effective date of § 228 of the Staggers Rail Act of 1980. See Report of the Committee on Conference, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 142 (1980). That statutory change, however, would have no effect on our conclusions.

20. See the discussion at the end of section I. above.

After a preliminary report and public hearings the RSPO issued its Final Report in February 1978. The report recommended that the Commission adopt a policy that it would no longer impose conditions on a merger merely to preserve weak carriers, but only to preserve essential services to the public, regardless of who provides them. Rail merger Study-Final Report (Rail Services Planning Office) (February 1, 1978), pp. 38-39.

The Commission formulated a policy statement based upon the RSPO recommendation, published it in proposed form, 43 F.R. 15753, and released its final policy in Railroad Consolidation Procedures, 359 I.C.C. 195 (1978).[21] This document stated

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21. The Commission denies in its brief that the "essential services" standard was a new policy. Nothing in our opinion turns on that question. We nevertheless reject that argument by the Commission because the RSPO Final Report, the Commission's own 1978 policy statement, and the BN-Frisco opinion

that

> "[t]he Commission believes that the railroad consolidation process should not be used as a means for preserving the system of financially weak and marginal railroads or for protecting them from undergoing reorganization, if necessary, under the bankruptcy laws. The Commission is concerned with the preservation of service, not of companies or railroad systems .... If it appears that the end result of a proposed railroad consolidation would be the permanent cessation of essential services by some other railroad, the Commission may deny the consolidation application or condition its approval upon the willingness of the applicants to restructure the proposal." (emphasis added)

359 I.C.C. at 199-200. This is a more lenient standard of merger approval because an application will no longer be denied or conditioned merely if it harms competitors, but only if it harms them to a degree that they cannot provide "essential services."[22]

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itself all make it abundantly clear that a new policy has been developed. See, e.g., BN-Frisco, 360 I.C.C. at 950-52.

22. The Commission specifically noted that

The Commission applied the new "essential services" standard throughout its BN-Frisco opinion,[23] consistently finding

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such a policy statement

> does not establish a binding norm, and it is not finally determinative of the issues or rights which it discusses. When the policy enunciated in the statement is applied in a specific proceeding, parties to that proceeding will have the opportunity to challenge or support the policy through appropriate evidence or argument.

Railroad Consolidation Procedures, 359 I.C.C. at 196.

23. See e.g., the following:

(1) "The merger of Frisco into BN presents us with just such an opportunity-two railroads voluntarily initiating a transaction that will reduce their costs and improve utilization of equipment and facilities without eliminating essential services," 360 I.C.C. at 935;

(2) "Not only will the services of the merged company be significantly improved, but other railroads will be able to continue providing essential services," 360 I.C.C. at 935;

(3) "We will protect impacted carriers simply because they find themselves in a situation where they must

that the merged BN-Frisco would not eliminate any of its own essential services, 360 I.C.C. at 935, and that no competitor would be harmed to a degree that it could not provide essential service, id. On this appeal, the Illinois parties challenge the application of this new standard on the ground that it violates the statutory mandate. Essentially, their argument is that Congress did not intend a lenient

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actively compete. As stated in our policy statement, we look only to preservation of essential rail service when imposing protective conditions, not to the protection of corporate entities," 360 I.C.C. at 944;

(4) "We do not believe that a merger should be conditioned unless essential services have been shown to be affected ...," 360 I.C.C. at 951; and

(5) "The Commission has imposed indemnity conditions when it was concerned about preserving existing service ... We no longer require that corporate entities be preserved; rather we are concerned about essential services," 360 I.C.C. at 952.

"essential service" standard of merger approval for § 11344 proceedings, but only for the separate, expedited consolidation procedures that it created in § 11346.[24] The Illinois parties argue that the Commission has "lifted" the essential services standard from § 11346 into § 11344, contrary to congressional intent.

This argument is without merit. The truth of the matter is that the "essential services" standard appears nowhere in either § 11344 or § 11346, or their legislative

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24. Section 11346 allows certain carriers to use its expedited procedures for merger approval before January 1, 1982. The time limit was intended to encourage speedy rationalization of the nation's rail system.

The expedited procedures allow the Commission to name a panel that must make a recommendation on the merger within 180 days. The Commission must then act on the recommendation within 120 days. The Commission approves or denies the merger if it is "in the public interest," and does not have to consider the specific factors enumerated in § 11344(b). 49 U.S.C. § 11346.

histories. It was a creation of the RSPO[25] as a new weighing of subsidiary factors within the public interest standard, and was properly adopted by the Commission on its own merits. Congress intended mergers initiated under either section to be evaluated by the "public interest" standard specifically stated in both.[26] The Commission has

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25. The RSPO apparently believed that "the preservation of essential service" was "emphasized" in § 11346, in contrast to the Commission's policy of ensuring the survival of marginal carriers by forcing their inclusion in mergers proposed by stronger lines. RSPO Final Report at 38. But the RSPO cited no authority for finding this "emphasis" in § 11346, and none has been cited to us by any party on appeal. It matters not, however, because the Commission adopted and adequately explained its essential services standard without any mention of Congressional authorization from § 11346. Railroad Consolidation Procedures, 360 I.C.C. at 195-200. Because this policy was adopted with the proper explanation and is clearly within other statutory guidelines, it stands on its own feet, regardless of what the RSPO thought § 11346 "emphasized."

26. The Illinois parties attempt to find some basis for distinction between §§ 11344 and 11346 in the fact that the former says "consistent with the public interest" while the latter says "in the public interest."

determined that the public interest standard is the same in both sections, Railroad Consolidation Procedures, 359 I.C.C. at 199, and that the preservation of essential services is one component of the same public interest standard, id. Section 11346 is more "lenient" only in that it expedites the merger approval procedurally and relieves the Commission of the duty to consider the four factors required in § 11344(b).27 We reject the contention of the Illinois parties. The Commission is free to apply an essential service standard as a component of the "public interest" under either § 11344 or § 11346.

The Illinois parties next argue that the essential service standard violates the Commission's obligation to consider "the

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There is no legislative history or other statutory basis whatsoever to support this strained argument.

27. Section 11346 is summarized in note 24.

effect of the proposed transaction on the adequacy of transportation to the public." 49 U.S.C. § 11344(b)(1). Soo repeats that objection and also contends that the new standard (1) violates the national transportation policy and the Commission's responsibility to protect the total public interest under § 11344; and (2) violates 49 U.S.C. § 10101, which establishes the national transportation policy of ensuring "the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States." Neither the Illinois parties nor Soo offer any more specific or substantial arguments on behalf of these contentions. Instead, Soo debates procedural objections that we discuss below, and the Illinois parties argue only that the new standard "unleashes ruinous market forces," pointing to the loss of one train daily between Centralia and Galesburg, Illinois.

Without more assistance from the parties, we can find no inconsistency between the essential services standard and the "adequate transportation" consideration mandated by § 11344(b)(1), or any other statutory requirement cited by Soo. As stated above, the decision to approve a merger or impose protective conditions always involves a balance of improved service and carrier strength in the merging railroads against possible decreased service and carrier strength in competitor railroads. In the past, the Commission would deny a merger or dissipate its benefits in the form of protective conditions merely if a competitor were harmed or lost a share of the market.[28] The essential services standard represents a new weighing of those same factors: a merger that is

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28. See, e.g., the Commission opinions cited in notes 13-16.

otherwise beneficial to the public will not be denied or conditioned unless essential services to the public are lost. Railroad Consolidation Procedures, 359 I.C.C. at 198-200. The Commission has determined that the public will benefit in overall service if competing carriers are less shielded from the need to face the challenge of strong merged carriers. Burlington Northern, Inc.-Control and Merger, 360 I.C.C. at 950-52. In order to gain that overall benefit for the public, the Commission has decided that only "essential services" should be protected. We find that new weighing of the public interest perfectly appropriate under § 11344(b)(1) and any of the other broad statutory standards. Furthermore, it is exactly the kind of sensitive re-evaluation of "the public interest" that Congress intended the Commission to undertake. American Trucking Association, Inc. v. Atchison, Topeka, and Santa Fe Railway, 387

U.S. 397, 416, 87 S. Ct. 1608, 1618, 18 L.Ed.2d 847 (1967).

Soo finally objects to the essential services standard because it is a departure from the Commission's longstanding policy to impose protective conditions merely to preserve the competitive ability of non-merging carriers. But it is established beyond argument that an agency may change its policies so long as it identifies and articulates its reasons for doing so. As the Supreme Court has stated in another ICC case:

> [W]e agree that the Commission, faced with new developments in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. [citations omitted.] In fact, . . . this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair

> and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

American Trucking Associations, 387 U.S. at 416, 87 S. Ct. at 1618.

The Commission must explain its departure from previous policy so that a reviewing court may determine that the decision is reasoned and not arbitrary. Burlington Truck Lines v. United States, 371 U.S. 156, 167-68, 83 S. Ct. 239, 245, 9 L.Ed.2d 207 (1962). But the Commission abundantly fulfilled that task in its 1978 policy statement and in the BN-Frisco opinion itself.29

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29. The relevant discussion from the 1978 policy statement, Railroad Consolidation Procedures, 359 I.C.C. at 199-200, was quoted in the fourth paragraph under VI.1.

In the BN-Frisco opinion, the Commission reviewed its more liberal use of protective conditions in prior mergers, then said

> This has been our policy in the past.

Having concluded that the "essential

However, the overriding factor governing the imposition of all conditions in the past has been the public interest. We would be remiss if we did not consider today's limits when imposing conditions on a railroad merger instead of viewing the industry as static.

. . . The voluntary consolidation of more than one railroad, when properly conceived and executed, is expected to yield certain benefits to that railroad. Any condition imposed on that merger tends to decrease or eliminate the merger's expected benefits . . .

As we have said, railroads do not have a proprietary right in the future to the traffic they have carried in the past. Therefore, we need not protect railroads from the possible loss of traffic through diversion to a merged railroad. On the contrary, protecting competitive railroads tends to limit a shipper's ability to obtain the best service from the merged company and dampens the incentives for competitive response to the merged company from existing railroads. . . .

We have stated that we would not impose conditions solely to compensate carriers for diversion or protect them from the risks of competition. In connection with transactions such as this, it is not practicable, nor would it be in the public interest, to impose conditions calculated to freeze the flow of traffic into a preexisting pattern or to protect

services" standard is clearly within statutory guidelines and has been adequately explained, our review of that issue is complete.

2. **The limitation of D.T. & I. Conditions.**

In virtually every merger approval since 1950, the Commission has imposed D.T. & I. conditions permanently, while retaining jurisdiction to amend or remove the

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competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporation. Such action would prevent, to a substantial extent, the effectuation of service improvements to which the shipping public is entitled, and would unduly restrict the unified company in its solicitation and routing of traffic under development of a strong competitive system.

We do not believe that a merger should be conditioned unless essential services have been shown to be affected . . . .

360 I.C.C. at 950-51.

conditions at any time. Thus all of the parties to this proceeding assumed the existence of "permanent" D.T. & I. conditions in preparing economic data and traffic diversion projections for the Commission's use. After the record was closed, however, the Commission informed the parties in its order setting the case for oral argument that it might approve the merger without permanent D.T. & I. conditions. No parties objected during the course of oral argument before the Commission that this decision might undermine other evidence.[30] Prior to the release of the BN-Frisco opinion, the

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30. In fact, no party even mentioned that a decision not to impose permanent D.T. & I. conditions would affect other evidence. In the course of oral argument by the BN counsel on another issue, Commissioner Alexis interjected the question whether BN was saying that it had no evidence as to the diversions that would occur in the absence of D.T. & I. conditions. Counsel answered in the affirmative, but the issue was never developed or even mentioned again in the entire record.

Commission announced in Seaboard Coast Line Railroad, et al.-Investigation of Control and Modification of Traffic Conditions, 360 I.C.C. 582, 603 (1979), appeal pending on other grounds, 5th Cir. No. 80-5030, that is was adopting the "essential services" standard in relation to D.T. & I. conditions and would entertain petitions for the removal or modification of conditions imposed in prior mergers. The Commission also announced in Seaboard that it now interprets the Interstate Commerce Act to provide most of the same protection against unfair carrier practices previously offered by D.T. & I. conditions.[31]

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31. See note 12 and the accompanying text for examples of the unfair practices prohibited by D.T. & I. conditions.

The Commission's new interpretation of the Act was stated as follows:

> We acknowledge that the railroads are a highly interdependent network and that open routings, gateways, and interchanges are essential. In the past we

In the BN-Frisco opinion, the Commission took the unusual action of imposing D.T. & I. conditions and retaining jurisdiction for a two year period only. Katy, Soo, and the Kansas City Board of Trade object on appeal that this two-year limitation

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have used the DT&I conditions to prevent the closing of routes and gateways and to prohibit discrimination at interchanges. We now believe that this practice is overly broad, in view of the changes in the industry's structure over the last 15 years. The Interstate Commerce Act provides the needed protections of particular interchanges and services, and in the future, we will enforce the statutory provisions to assure open routing, gateways and interchanges. See 29 U.S.C. 11101 (formerly section 1(4)), imposing the common carrier obligation to provide service and to establish reasonable through routes and rates; 49 U.S.C. 10741 (formerly section 3(4)), requiring equal interchange facilities; and 49 U.S.C. 10705 (formerly sections 15(3) and (4)) authorizing the Commission to establish through rates, joint rates and the division of joint rates. Evidence relating to the need for protection against predatory or unfair competitive practices can be submitted with a complaint filed under these provisions.

Seaboard, 360 I.C.C. at 603.

nullified the Commission's substantial evidence as to the effects of the merger after the second year, because all of the data before the Commission assumed that D.T. & I. conditions would be imposed indefinitely.

For the purpose of discussion, it will be helpful to distinguish two kinds of traffic diversions involved in this question. The first is the kind of diversion that is inherent in the merger with or without D.T. & I. conditions, merely because the single-line BN-Frisco service will be faster or more efficient than parallel service over Katy or Soo that must interconnect with BN-Frisco or some other carrier. All the parties agreed that these diversions, which we will call "inherent" diversions, would be effected only over a three-year period, presumably because of the time necessary to integrate the two lines and make shippers aware of the benefits. The second type of

diversion would be possible only when D.T. & I. conditions were lifted, so that the BN-Frisco could, subject to several contingencies discussed below, close routes or rates it previously maintained with Katy or Soo, for example, and take that traffic entirely for itself. We will call this second type "post-D.T. & I." diversions.

The Commission made a specific finding, based on the projections of all parties, that 95% of the "inherent" diversions would be achieved by the end of the second year, 360 I.C.C. at 1108, when D.T. & I. conditions would still be in place. It is therefore fair to say that the Commission had substantial and reliable evidence as to 95% of the diversions that will occur because of the benefits that are inherent in the merger itself. If any post-D.T. & I. diversions occur--and that is very much open to question, as we discuss below--they will involve a simple transfer of traffic and

revenues from the weaker competitor to the stronger BN-Frisco. Thus the benefits of the merger to BN-Frisco and to the public it serves could only be increased by post-D.T. & I. diversions. The negative effects of these diversions would be solely a question of lost traffic and revenues to the weak carriers, which can be remedied entirely by adjustments to the protective conditions themselves, rather than by reassessing the entire merger. Consequently, the Commission's substantial evidence supporting the approval of the merger itself is unaffected by the decision to limit D.T. & I. conditions.[32]

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32. Katy and Soo have argued that any current doubt about the Commission's decision regarding the need for protective conditions also calls into question the Commission's approval of the entire merger, because the Commission might decide that the merger is not in the public interest with the particular protective conditions it might find necessary to protect competing carriers. We disagree. The Commission obviously viewed the approval of the merger as a decision

If the limitation of D.T. & I. conditions nullified substantial evidence used by the Commission, the only decision affected would be the conclusion that the competing carriers had no need of special

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quite distinct from any future changes it might make in protective conditions: it specifically retained jurisdiction only over protective conditions and released the merger approval from its control. The merged company will thus become one of the "given" factors in any future re-evaluation of a competitor's need for protection in the context of the larger public interest.

This argument also overestimates the matter that might be in doubt. Inherent diversions are unaffected by the D.T. & I. limitation. Post-D.T. & I. diversions, if they occur, can be corrected without the slightest reduction in the benefits that the Commission found to justify the merger. For instance, if the Commission found that $10 million in post-D.T. & I. diversions will occur from Katy to the merged BN-Frisco each year, even a complete indemnification of Katy for the full $10 million of added diversions, the most far-reaching protective condition that the Commission could impose, would leave all of the other merger benefits relied upon by the ICC completely intact. The $10 million that the BN-Frisco would be required to return to Katy would leave intact the $33 million in new revenues that the BN-Frisco had gained from inherent diversions and other merger benefits.

protective conditions or of the standard D.T. & I. conditions after the second year.[33] Of course, the Commission's evaluation of competing carriers is supported by substantial and reliable evidence through the second year, when D.T. & I. conditions will still be in effect. But the picture may change greatly in the third year. That is a problem only because the Commission's opinion frequently cites figures and projections for the third year that are completely unreliable if substantial post-D.T. & I. diversions occur in that year.[34]

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33. As this sentence makes clear, part of the difficulty in discussing the Commission's D.T. & I. limitation is the circularity of the issue itself: did the Commission's decision not to impose protective conditions undermine the substantial evidence it needed to decide whether to impose protective conditions?

34. It is totally within the Commission's expert judgment to choose the period of time that is relevant to evaluate a merger's future effect on the public interest. The Commission's rules for evidence and exhibits submitted in merger proceedings require that all projections cover the first three post-

Whether these diversions do occur, however, is a matter that is entirely subject to future decisions of the Commission and the parties to this action. First of all, the Commission specifically retained jurisdiction over the conditions for two years. 360 I.C.C. at 1179-80. As all of the parties gain experience with the actual impact of the merger, any of them can submit a proposal to the Commission to extend the D.T. & I. conditions into a third year or longer, if the actual facts justify

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merger years. 49 C.F.R. §§ 1111.1-2. The BN-Frisco opinion also cites and relies upon many projections that extend into the third year. Of course, these indications that the Commission looked at third year figures that were based on certain assumptions did not automatically prohibit the Commission from altering any of those assumed conditions. That would be far too rigid a straightjacket to impose on administrative procedures. Likewise the Commission could change the relevant focus to a two-year period and explain its choice. That is essentially what the Commission did here--the issue is complicated only because the Commission did not fully and directly explain the change in focus.

such protection.[35] Second, the Commission's new view that the Interstate Commerce Act prohibits most of the unfair practices previously controlled through D.T. & I. conditions[36] means that any carrier may, in effect, extend the D.T. & I. conditions by

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35. In prior merger approvals, the Commission had always retained jurisdiction over D.T. & I. conditions indefinitely, so that any party could petition to amend or remove the conditions. In light of this practice, the Commission's limitation of D.T. & I. conditions to two years, with the retention of jurisdiction, really amounts to little more than a procedural decision to reverse the burden of proof. Prior decisions had assumed D.T. & I. conditions remained justified unless a protesting party objected and proved otherwise. The Commission now assumes that, after two years, they will not be justified unless a protesting party objects and proves otherwise.

36. See note 31 and accompanying text.

An example of the Act's duplication of D.T. & I. conditions is that 49 U.S.C. § 10705(d) currently gives Katy the power to challenge any future cancellation by BN-Frisco of a through route or joint rate and to force BN-Frisco to prove before the Commission that such cancellation is consistent with the public interest. That one section alone gives Katy substantial safeguards against post-D.T. & I. diversions.

protesting any discriminatory practices to the Commission. Third, as the Commission noted, 360 I.C.C. at 957, during the first two post-merger years the affected carriers will be able to make significant adjustments to the new competition. Katy and Soo have a strong incentive to meet the challenge of the more efficient BN-Frisco, and their response may greatly reduce or eliminate the post-D.T. & I. diversions that might occur if the two contingencies discussed above do not prevent those diversions in the first place.

Furthermore, the Commission's projection of carrier economic conditions three years into the future is a kind of agency function that the Supreme Court has recognized to be primarily a question of probabilities, and thus peculiarly subject to the expert experience, discretion, and judgment of the Commission. In making a predictive judgment, the expertise of the Commission

supplements, and may supplant, the projections placed in the record by the parties. FCC v. National Citizens Commission for Broadcasting, 436 U.S. 775, 814, 98 S. Ct. 2096, 2122, 56 L.Ed.2d 697 (1978); United States v. ICC, 396 U.S. 491, 516, 90 S. Ct. 708, 720, 24 L.Ed.2d 700 (1970); FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 28-29, 81 S. Ct. 435, 450, 5 L.Ed.2d 377 (1961); United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236, 240-41, 66 S. Ct. 75, 77, 90 L.Ed. 38 (1945). To hold otherwise would paralyze agencies merely because the future is not subject to proof. While an agency cannot make a projection that is without any reasonable basis, the role of substantial evidence is greatly diminished. The unique context of this decision, particularly the fact that the Commission remains completely in control of whether any post-D.T. & I. diversions actually occur, gives the

Commission a reasonable basis to project Katy's and Soo's economic future and need for protective conditions throughout the three-year period under examination.37

Because the evidence before the Commission was 95% complete and reliable, through the second post-merger year, and especially because the third-year impact is entirely subject to the future actions of the parties and the continuing jurisdiction of the Commission, we do not find that the two-year limitation undermined the Commission's ability to project the need of

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37. We are especially inclined to allow the Commission leeway in these future projections because it is clearly developing an entirely new set of policies regarding D.T. & I. conditions. In fact, the Commission has announced a rulemaking proceeding that might eliminate all past D.T. & I. conditions and establish a rule for their future use. 45 F.R. 46461 (July 10, 1980). The BN-Frisco opinion acknowledged the probability of such a proceeding and that the two year limit on D.T. & I. conditions is part of the Commission's re-evaluation process. 360 I.C.C. at 957.

competing carriers for protective conditions.38

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38. We acknowledge that the Commission's explanation of its decision leaves much to be desired. When the Commission's own rules and the bulk of its opinion had indicated that the third year was of some significance, the Commission should have explained the two year limitation more thoroughly. The only specific explanation offered was:

> We believe this will give affected carriers significant time to adjust to the new competitive climate. Although we understand that the routing practices between the railroads are of longstanding [sic], that does not require that it take a long time to change them. We are currently reevaluating our imposition of traffic protective conditions and will issue a policy statement on the matter shortly which may modify these conditions, but only after careful consideration.

360 I.C.C. at 957.

We do not mean to condone or encourage such abbreviated explanations of agency action. Nevertheless, we may uphold "a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86, 95 S. Ct. 438,442, 42 L.Ed.2d 447 (1974). With the aid of our strongest bifocals, we can trace the Commission's footsteps here, in

3. The Denial of Special Protective Conditions

Both Katy and Soo asked the Commission to impose extensive special protective conditions, in addition to the standard D.T. & I. conditions, to protect them from various detrimental effects of the merger. Katy requested, among other conditions, complete indemnification for 20 years against all traffic lost to the merged BN-Frisco, regardless of the reason for the diversion and regardless of Katy's other income. Soo requested a variety of conditions[39] that not only would insulate it from economic loss, but would actually improve its long-term financial position by more than $8 million.

The Commission denied these requests for special protective conditions and indemnification. Katy argues on appeal that

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the light of the opinion as a whole.

39. See note 10 above.

the decision of the Commission to deny indemnification and special protective conditions was based upon projections of Katy's ability to survive the losses, both of which were not supported by adequate findings or substantial evidence. Specifically, Katy says that (1) the Commission made no specific findings as to the net revenue effect from the three sources of Katy's new positive financial standing as identified by the Commission and (2) it was improper for the Commission to consider these three sources of financial stability because they are "speculative".

Katy's first point of error is without merit because, as discussed under VI.2. above, an agency is not required to make specific findings in the course of making future projections. National Citizens Commission, 436 U.S. at 814, 98 S. Ct. at 2122; United States v. ICC, 396 U.S. at 516, 90 S. Ct. at 720; Transcontinental Gas Pipe,

365 U.S. at 28-29, 66 S. Ct. at 77. This reasoning even allows an agency to speculate about the future to some degree, based on available facts. McLean Trucking, 321 U.S. at 89, 64 S. Ct. at 381. Thus Katy's second point of error is also without merit, even if we accepted Katy's characterization of the Commission's projection as "speculative."

But a review of the record shows that the Commission cited very reliable evidence as the basis of its projection that Katy can withstand these diversions without a loss of essential service. The Commission fully acknowledged Katy's bleak financial history, but the relevant decision was concerned with Katy's future, and in that context the Commission gave greater weight to three new sources of financial stability for Katy. 360 I.C.C. at 954-55, 1118-22. First, the Commission found that Katy can expect strong growth in revenues because of coal

transportation for several new electric generating plants. Three of the units were completed as of the time of the Commission's opinion, and Katy itself projected $26 million annually in new revenues from these plants alone. Five additional units were and are projected, each generating $10 million in additional gross revenues for Katy. These findings alone would support the Commission's view that Katy can withstand the merger, because the maximum gross revenue loss for Katy due to the merger is projected to be about $9 million. 360 I.C.C. at 1091. Second, the Commission found that Katy will experience substantially reduced maintenance costs because of the imminent completion of a major track rehabilitation program. Again, the testimony of Katy's own witnesses largely supported the Commission's evaluation of the program. Katy cannot argue with the Commission's choice to believe them. Third,

the Commission recognized that Katy had concluded an agreement with its parent company to be reimbursed for any Katy tax losses that could be utilized by the parent company. The agreement is an undisputed fact, and demonstrably provides Katy with a significant "cushion" against losses. It was not an improper consideration in evaluating Katy's overall financial stability. Taken together, these three factors offer substantial support for the Commission's projection of Katy's future.[40] If the first two post-merger years prove the Commission to have been wrong, Katy has a complete

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40. We note that Katy reported most of these same projections in glowing terms to its own shareholders in the company's 1977 annual report, which was part of the record before the Commission. Furthermore, Katy's briefs and oral argument on this point were little more than requests that we re-weigh the evidence, a task that has long been recognized to be beyond the competence of a reviewing court.

remedy in petitioning the Commission to amend the conditions imposed on the merger.

Soo argues on appeal that the Commission's projections of its losses due to the merger were not supported by substantial evidence and that, therefore, the decision to deny Soo's requested protective conditions must be remanded. We reject this argument because the Commission made a specific finding that Soo could easily withstand even the larger diversions and losses that Soo itself projected. 360 I.C.C. at 953. Soo does not challenge that finding, so the exact amount of Soo's projected losses is immaterial for the purposes of this review. The Commission's ultimate conclusion, that Soo did not need protection, is not affected even if Soo's projections are more accurate than the Commission's.

4. The Commission's New Policies Regarding Indemnification

The Commission also announced in its decision two new policies: (1) indemnification of a competitor railroad for traffic losses due to a merger will no longer be viewed as a viable protective condition "under any circumstances," and (2) the Commission will no longer impose any protective condition not sought by a protesting railroad. 360 I.C.C. at 953. In sections VI.2. and 3. above, we rejected Katy's argument that there was no substantial evidence to support the finding that Katy did not need special protective conditions, including indemnification. Katy now asserts as an independent ground of error that these two new policies as applied to Katy were arbitrary, capricious, and a violation of procedural due process because they were adopted "without warning."

It is true that the Commission's new policies regarding indemnification and "unrequested conditions" were not announced until the BN-Frisco opinion. But even if both of these policies were applied to Katy in this opinion, a matter itself very much in question,[41] that would not provide the slightest ground of error. An agency may change its policies in the course of a specific adjudication, American Trucking, 387 U.S. at 416, 87 S. Ct. at 1618, and even apply those policies for the first time to the parties involved, NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-94, 94 S. Ct. 1757, 1770-71, 40 L.Ed.2d 134 (1974); SEC v. Chenery Corp., 332 U.S. 194, 202-04, 67 S. Ct. 1575, 1580-81, 91 L.Ed. 1995 (1947). The only restriction upon an agency's discretion to develop policy in this manner

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41. See the final paragraph of this section.

is that the agency must adequately explain its departure from the previous policy. Atchison, T. & S. F. Ry., 412 U.S. at 807-08, 93 S. Ct. at 2374-75 (1973).

The Commission's duty to explain its change in policy regarding indemnification was adequately fulfilled in the BN-Frisco opinion itself.[42] We find that explanation

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42. The explanation was given as follows:

> The Commission has imposed indemnity conditions when it was concerned about preserving existing service for the public and when it appeared that alternate protective conditions would not accomplish this result.
>
> Our imposition of indemnification in the past has been to allow a carrier to continue to provide service while a more permanent solution was being finalized. We no longer require that corporate entities be preserved; rather, we are concerned about essential services. In this climate a provision of indemnity seems highly anticompetitive. Indemnity may well induce a carrier to become less aggressive and provide less than optimum service. Indemnity also may be viewed as a reward for

entirely satisfactory, which completes our inquiry regarding the new indemnification policy.

The Commission's explanation of its "unrequested conditions" policy is given in the context of a discussion of the Commission's new restricted use of protective conditions. The "policy" is announced less as an independent principle than as a means of ensuring that conditions are not imposed unless substantially justified:

> We do not believe that a merger should be conditioned unless essential services have been shown to be affected .... Hence, a condition would not be imposed which drains the benefits of a proposed merger

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> being unable to compete in the marketplace. This transfer of funds would, in effect, be a massive cross-subsidization not only of commodities, but of inefficient operation of another railroad, merely to preserve the existence of the other railroad. Hence, we do not see indemnity as a viable condition under any circumstances.

360 I.C.C. at 952-53.

> unless it benefits shippers, is operationally feasible, is related to the competition that will ensure [sic] from the merger, is sought by the protestant ..., and would not jeopardize the future of the merged company by depriving it of major benefits of the merger. [emphasis added]

360 I.C.C. at 951-52. A more thorough analysis would be helpful. But in the context of the Commission's larger policy decision restricting the use of protective conditions, the "unrequested conditions" policy is adequately explained as a means of implementing the larger policy. The Commission is merely announcing that it will no longer take the initiative in suggesting protective conditions. It is reasonable to assume that a carrier will request those conditions that are actually needed in a merger, and that the Commission's former policy of initiating protection often led to unnecessary restrictions. The explanation might have been more complete, but we will "uphold a decision of less than ideal clarity if the

agency's path may reasonably be discerned." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86, 95 S. Ct. 438, 442, 42 L.Ed.2d 447 (1974). That standard has been met here, once the "policy" is viewed in its proper context.

Katy further argues that, even if these two new policies are otherwise proper, their joint application for the first time to Katy is a denial of due process because Katy relied on receiving indemnification, so requested no other special protective conditions and is now foreclosed from requesting any additional protection. This argument is undercut from all sides. In the first place, there is no indication in the opinion itself that the Commission reached any decision through applying the new policies to Katy. The Commission consistently states that Katy failed to establish the need for any protective condition at all, a decision on the merits that does not involve either

policy. Second, if Katy relied upon receiving indemnification, that reliance was grossly misplaced. The Commission has imposed indemnification only twice in its history. Penn Central Merger Case, 322 I.C.C. at 529, 532 (1966); Chicago & Northwestern Railway-Control-Chicago Rock Island and Pacific Railroad, 347 I.C.C. 556, 616, 627, 630, 631 (1974). And even if it were not misplaced, such reliance cannot stand in the way of an agency's new policy determinations, at least absent "substantial" adverse consequences. Bell Aerospace, 416 U.S. at 295, 94 S. Ct. at 1772. Assuming arguendo that the Commission applied the policies to Katy, we cannot say that Katy has suffered "substantial" adverse consequences when it can petition the Commission to amend the conditions should the future show that the Commission's judgment was wrong. We therefore find no

basis to remand the Commission's decision on these grounds.

5. The Anticompetitive Effects of the Merger

The Commission found that the merger "will not adversely diminish competition" and would, in fact, stimulate overall competition. Although the Commission used the Department of Justice study that came to the same basic conclusion, the opinion indicates that the Commission also relied upon its own studies, data, and conclusions. 360 I.C.C. at 941. The Illinois parties charge that this analysis was defective, but the only substantial grounds they advance are that the Commission did not make specific findings about the tendency of the BN-Frisco merger to encourage other mergers in the future. This argument is, once again, based on a misunderstanding of the need for

specific findings in the context of an agency's projections of the future. National Citizens Commission, 436 U.S. at 814, 98 S. Ct. at 2122; United States v. I. C. C., 396 U.S. at 516, 90 S. Ct. at 720; Transcontinental Gas Pipe, 365 U.S. at 28-29, 66 S. Ct. at 77. In addition, the Commission noted that

> [a] domino type effect from a merger of this sort is not necessarily contrary to the public interest. Indeed, where rail carriers are forced to look to rationalization, operating efficiencies, elimination of redundant facilities, and improved service through some form of consolidation or restructuring to continue essential services, the public interest can only benefit.

360 I.C.C. at 930. Any future mergers will be evaluated on their own merits to determine whether they are consistent with the public interest. Consequently, no other findings about future mergers were necessary in the BN-Frisco opinion.

6. Employee Protection

The operating efficiencies created by railroad mergers often result in a loss of positions for current employees. Section 11347 of the Interstate Commerce Act[43] therefore requires the Commission "to provide a fair arrangement ... protective of the interest of employees who are affected by the transaction...." The second sentence of this provision allows "the rail carrier

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43. The current text of § 11347 reads, in relevant part, as follows:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees.

and the authorized representative of its employees" to negotiate their own protective arrangement, obviating the need for the Commission to impose employee protection.

The final issue in this appeal is whether that requirement is intended to cover employees of any carrier, or only employees of the merging railroads. The RLEA has urged the broader interpretation upon the Commission and reviewing courts since 1946, largely without success. The Commission has consistently held that § 11347 covers only employees of merging carriers,[44] and has been upheld twice by

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44. New York Dock Ry.-Control-Brooklyn Eastern Dist., 354 I.C.C. 399 (1978), 360 I.C.C. 60 (1979); Great Northern Pac.-Merger-Great Northern, 331 I.C.C. 228 (1967); Pennsylvania R.R.-Merger-New York Central R.R., 328 I.C.C. 304, 343-344 (1968); Texas & Pacific Ry.-Control-Kansas O. & G. Ry., 321 I.C.C. 309, 339 (1964); Seaboard Air Line R.R.-Merger-Atlantic Coast Line, 320 I.C.C. 122, 203-204 (1963), aff'd Florida East Coast Ry. v. United States, 259 F. Supp. 993, 1019 (M.D. Fla. 1966), dismissed as moot sub nom. R. L. E. A. v.

reviewing courts.[45] The RLEA position has been clearly affirmed by a reviewing court only once.[46]

United States, 386 U.S. 544, 87 S. Ct. 1299, 18 L.Ed.2d 285 (1967); Chesapeake & O. Ry.-Control-Baltimore & O. R.R., 317 I.C.C. 261 (1962); Southern Ry.-control-Central of Georgia Ry., 317 I.C.C. 557, 567-8 (1962), aff'd, R. L. E. A. v. United States, 226 F.Supp. 521 (E.D. Va. 1964); Baltimore & Ohio R.R. Operation, 261 I.C.C. 615, 619-20 (1946).

45. Florida East Coast Ry. v. United States, 259 F.Supp. 993, 1019 (M.D.Fla. 1966) (affirming Seaboard Air Line Railroad), dismissed as moot sub nom. R. L. E. A. v. United States, 386 U.S. 544, 87 S. Ct. 1299, 18 L.Ed.2d 285 (1967); R. L. E. A. v. United States, 226 F.Supp. 521, 525 (E.D. Va. 1964).

46. Soo Line R.R. v United States, 280 F.Supp. 907 (D.Minn. 1968). The RLEA also cites R. L. E. A. v. United States, 216 F.Supp. 101 (E.D. Va. 1963), as authority for its position. We interpret that case to be based on the unique factual situation that the employees of the nonmerging railroad found to be covered under § 11347 were in effect employees of the merging railroad. A later decision by the same court refused to follow the broader interpretation of Soo Line urged upon us by the RLEA and upheld the ICC position. R. L. E. A. v. United States, 226 F.Supp. 521, 525 (E.D. Va. 1964).

In the BN-Frisco opinion, the Commission considered the effect of the merger on all carrier employees as part of its broad view of the public interest under § 11344(c). But only the employees of BN and Frisco were granted actual protection in the Commission's order. 360 I.C.C. at 946-48. The Commission thoroughly discussed the RLEA position, but rejected it based on a view of the statute as a whole, its legislative history, and its interpretative history.

The Commission first noted that, although the first sentence of § 11347 seems to require protection for <u>any</u> carrier employee affected by the merger, the second sentence provides, in an undifferentiated transition, that "the arrangement may be made by the rail carrier and the authorized representative of its employees." It is difficult to imagine that when Congress wrote this sentence it was contemplating that a non-merging carrier would agree to

protect its own employees from the merger of two competing carriers. Because the second sentence obviously applies only to the merging carrier, the Commission reasons that Congress intended that same meaning in the preceding sentence.

The Commission finds this interpretation fortified by the statute's legislative history. Section 11347 is descended directly from the Washington Job Protection Agreement of 1936 (WJPA), which served as the model for § 5(2)(f), later recodified as § 11347, when it was first enacted as part of the Transportation Act of 1940. Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169, 173-74, 81 S. Ct. 913, 915, 6 L.Ed.2d 206 (1961); United States v. Lowden, 308 U.S. 225, 237-38, 60 S. Ct. 248, 254-55, 84 L.Ed. 208 (1939).[47] The WJPA limited its job

47. See, also, New York Dock Ry. v. United

protection to employees of the merging carriers.[48] The Commission reasoned that this legislative history indicates Congress did not intend § 11347 to require a more liberal scope of job protection.

Finally, the Supreme Court has stated that a reviewing court may "accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially

States, 609 F.2d 83, 86 (2d Cir. 1979); testimony of George M. Harrison before the House Committee on Interstate and Foreign Commerce, H.R. 2531, 76th Congress, 1st Sess. 213, 216-17, 241, 243 (1939), and before the Senate Committee on Interstate Commerce, S. 1310, 2016, 1869, and 2009, 76th Cong., 1st Sess. 34 (1939).

48. For example, § 4 of the WJPA, quoted by the Commission, 360 I.C.C. at 949, n.81, reads: "Each carrier contemplating a coordination shall give at least ninety (90) days written notice to bulletin boards convenient to the interested employees of each such carrier and by sending registered mail notice to the representative of such interested employees." Other sections of the WJPA also define the operation of the agreement in terms of the employees of the applicant carriers. See, e. g., §§6(a), 7(a), 10(a), and 11(a).

so where Congress has re-enacted the statute without pertinent change." Bell Aerospace, 416 U.S. at 275, 94 S. Ct. at 1762. Congress re-enacted and amended § 5(2)(f) in the 1976 4R Act, adding a requirement that an employee protection agreement under that section "shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision ...." 49 U.S.C. § 5(2)(f).[49] The Act, including § 5(2)(f), was further amended and recodified into 49 U.S.C. § 11347 in 1978. Revised Interstate Commerce Act, Pub.L. No. 95-473, 92 Stat. 1337. That act clarified the language of the 1976 amendment and again affirmed the Commission's use of employee protection prior to 1976. Because the Commission's view of its authority under § 5(2)(f) was

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49. The relevant text of § 11347, the successor of § 5(2)(f), is given in full at note 43 above.

well-established in 1976 and 1978, this double affirmation by Congress, in the absence of any other support for the RLEA position,[50] puts the question to rest. We affirm the Commission's view that § 11347 requires protection only for employees of the merging carriers.

The RLEA asserts as an independent error that § 11344(b)(4) requires the Commission to consider the "interest of carrier employees affected by the proposed transaction" as an element of the public interest before it decides that a merger is "consistent with the public interest." Based on certain language in the opinion,[51] the RLEA claims that

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50. The one district court case cited by the RLEA in support of its position, Soo Line, 260 F.Supp. at 907, did not consider the second sentence of § 11347 and was decided before Congress amended and recodified § 5(2)(f) in 1976 and 1978.

51. The RLEA bases its contention on the following language, used by the Commission to introduce its discussion of employee protection after having announced its approval of the merger: "Since we have decided to

the Commission violated this statute by considering the interest of employees only after deciding to approve the merger.

We reject this contention. Section 11344 is not intended to dictate a procedural order for the Commission's considerations. The statute says, "[in] a proceeding under this section, the Commission shall consider at least the following ...." That language clearly sets forth a list of considerations, and does not dictate a procedure. The Commission has fulfilled the requirement of § 11344(b)(4) if it considers employee interests during the course of its proceeding. The Commission carefully considered the interests of all employees in this case. During the course of its investigation, the Commission sent out detailed questionnaires

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approve the merger, we must consider the interest of, and provide protection for, carrier employees." 360 I.C.C. at 946.

to the fourteen carriers whose employees might be affected by the merger. Ten of these responded that their employees would not be adversely affected. Two of the remaining four carriers are now in the course of liquidation or restructuring. Of the remaining two carriers, Katy claimed a possible impact on 37 employees and admitted that even this figure would be "mitigated by attrition." 360 I.C.C. at 872. Illinois Central Gulf Railway said that adverse impacts on employees could not be "precisely defined" because any loss of jobs could be the result of "numerous variables besides the proposed merger." Id. at 881. We find that this investigation and the Commission's thorough discussion of the effect of the merger on employees[52] fulfilled all of the statutory requirements.

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52. See, e. g., 360 I.C.C. at 872, 881, 897.

VII. Conclusion

The merged BN-Frisco will indeed present formidable new competition to the railroads in its service areas, and will change familiar shipping practices relied upon by trade organizations and businesses throughout the United States. The Commission has determined that this competition and change will reverberate beneficially throughout the rail transportation industry, and the strength of that ultimate conclusion is demonstrated by the fact that no petitioner before us could directly challenge it. We acknowledge that the Commission often failed to explain its reasoning and choices with the degree of clarity and thoroughness that we would wish. The transportation industry and the government agencies responsible for its regulation, however, are undergoing a period of profound and far-reaching change. The resulting discomposure certainly does not excuse any agency from the obligation to

explain its actions. But when lapses in clarity are due to uncertainty about the future course of policy or a desire to preserve options, it is appropriate for a reviewing court to uphold the agency's choices, provided that the agency's path can "reasonably be discerned." Bowman Transportation, 419 U.S. at 286, 95 S. Ct. at 442. We find that to be the case here. The stay of the order of the Interstate Commerce Commission is vacated; the decision of the Commission is AFFIRMED.

THE REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION (A 86 - A 485) IS CONTAINED IN A SEPARATE BOUND VOLUME.

80-1434

No. 80-

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FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1980

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BURLINGTON NORTHERN, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 23, 1981

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (A 1-A 85) IS BOUND TOGETHER WITH THE PETITION FOR A WRIT OF CERTIORARI

Served April 17, 1980

F-9851

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 28583 (SUB-NO. 1F)

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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FINANCE DOCKET NO. 28583 (SUB-NO. 1F)[1]

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided March 25, 1980

1. In Finance Docket No. 28583 (Sub-No. 1F), control and merger of the St. Louis-San Francisco Railway Company into Burlington Northern, Inc. is authorized, subject to conditions.
2. In Finance Docket No. 28583 (Sub-No. 2F), authority is granted to Burlington Northern, Inc.: (a) to issue 2,560,791 shares of common capital stock without par value; (b) to issue 1,347,785 shares of $2.125 no par value preferred stock, $25 redemption value; and (c) to assume all obligations, liabilities, and guarantees with respect to securities issued, assumed, or guaranteed by the St. Louis-San Francisco Railway Company and subsidiary or affiliated companies.

[1]This decision embraces Finance Docket No. 28583 (Sub-No. 2F), Burlington Northern, Inc.—Securities; No. MC-F-13500, Burlington Northern, Inc.—Control—Frisco Transportation Company; Finance Docket No. 28583 (Sub-No. 3F), Soo Line Railroad Company—Trackage Rights—Over Burlington Northern, Inc., Between McGregor, MN and Superior, WI, a Distance of 69 Miles; Finance Docket No. 28583 (Sub-No. 4F), Soo Line Railroad Company—Trackage Rights—Over Burlington Northern, Inc., Between Paynesville, MN and Superior, WI, a Distance of 162 Miles; Finance Docket No. 28583 (Sub-No. 5F), Soo Line Railroad Company—Trackage Rights—Over Burlington Northern, Inc., Between Schley (Soo Junction), MN and Superior, WI, a Distance of 146.2 Miles; Finance Docket No. 28583 (Sub-No. 6F), Soo Line Railroad Company—Trackage Rights—Over Burlington Northern, Inc., Between Bald Eagle, MN and Superior, WI, a Distance of 126.4 Miles; Finance Docket No. 28583 (Sub-No. 7F), Illinois Central Gulf Railroad Company—Trackage Rights—Over the St. Louis-San Francisco Railway Company, Between Memphis, TN and Jasper, AL, a Distance of 210 Miles; Finance Docket No. 28583 (Sub-No. 8F), Chicago and North Western Transportation Company—Trackage Rights—Over Burlington Northern, Inc., Between BN M.P. 492.7 at Council Bluffs, IA and BN M.P. 2.16 at BN Junction, MO, a Distance of 168 Miles; Finance Docket No. 28583 (Sub-No. 9F), Chicago and North Western Transportation Company—Trackage Rights—Over Burlington Northern, Inc., Between East Minneapolis, MN and East Superior, WI, a Distance of 143.8 Miles; Finance Docket No. 28583 (Sub-No. 10F), William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Lincoln and Havelock, NE, a Distance of 5 Miles; Finance Docket No. 28583 (Sub-No. 11F), William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company, Debtor—Trackage Rights—Over the Colorado and Southern Railroad Company, Between Denver and Golden, CO, a Distance of 13 Miles; Finance Docket No. 28583 (Sub-No. 12F), William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Ottawa and Streator, IL, a Distance of 17 Miles; Finance Docket No. 28583 (Sub-No. 13F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad (footnote continued on next page)

3. In No. MC-F-13500, acquisition of control by Burlington Northern, Inc., of the Frisco Transportation Company, through the merger with the St. Louis-San Francisco Railway Company, is authorized.
4. In Finance Docket No. 28583 (Sub-No. 3F), the Soo Line Railroad Company application for trackage rights over Burlington Northern, Inc. between McGregor, MN, and Superior, WI, is denied.
5. In Finance Docket No. 28583 (Sub-No. 4F), the Soo Line Railroad Company application for trackage rights over Burlington Northern, Inc. between Paynesville, MN, and Superior, WI, is dismissed.
6. In Finance Docket No. 28583 (Sub-No. 5F), the Soo Line Railroad Company application for trackage rights over Burlington Northern, Inc. between Schley (Soo Junction), MN, and Superior, WI, is denied.
7. In Finance Docket No. 28583 (Sub-No. 6F), the Soo Line Railroad Company application for trackage rights over Burlington Northern, Inc. between Bald Eagle, MN, and Superior, WI, is denied.
8. In Finance Docket No. 28583 (Sub-No. 7F), the Illinois Central Gulf Railroad Company application for trackage rights over the St. Louis-San Francisco Railway Company between Memphis, TN, and Jasper, AL, is denied.
9. In Finance Docket No. 28583 (Sub-No. 8F), the Chicago and North Western Transportation Company application for trackage rights over Burlington Northern, Inc. between Council Bluffs, IA, and BN Junction, MO, is dismissed.

(footnote 1 continued)
Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Terry, MT and Spokane, WA, a Distance of 1,081.07 Miles; Finance Docket No. 28583 (Sub-No. 14F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Tacoma, and Chehalis, WA, a Distance of 62.7 Miles; Finance Docket No. 28583 (Sub-No. 15F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Miles City, MT, and All Present and Future Coal Mines Located on the BN in MT; Finance Docket No. 28583 (Sub-No. 16F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Council Bluffs, IA and Kansas City, MO, a Distance of 189.69 Miles; Finance Docket No. 28583 (Sub-No. 17F), Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Bellingham and Cherry Point, WA, a Distance of 22 Miles; Finance Docket No. 28583 (Sub-No. 18F), Southern Pacific Transportation Company—Trackage Rights—Over Burlington Northern, Inc., and the Union Pacific Railroad Company, Between the Connection of BN and the Portland Terminal Railroad Company and (1) Trackage Serving North Rivergate and (2) the Barnes Yard of Union Pacific Railroad Company, a Distance of 16.3 Miles; Finance Docket No. 28583 (Sub-No. 19F), Atchison, Topeka and Santa Fe Railway Company—Trackage Rights—Over the St. Louis-San Francisco Railway Company, Between Tulsa and Oklahoma City, OK, a Distance of 112.8 Miles; Finance Docket No. 28583 (Sub-No. 20F), Application of the Montana Wheat Research and Marketing Committee for Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Lines in MT; Finance Docket No. 28583 (Sub-No. 21F), Application of Wyo-Ben, Inc., for Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Billings, MT, and Shoban, WY, a Distance of 227.1 Miles; Finance Docket No. 28583 (Sub-No. 22F), Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor—Trackage Rights—Over Burlington Northern, Inc., Between Miles City, MT, and Big Sky and Kuehn, MT, a Distance of 138.9 Miles; and Finance Docket No. 28583 (Sub-No. 23F), Illinois Central Gulf Railroad Company—Terminal Operations—Over the Missouri Pacific Railroad Company in Memphis, TN.

360 I.C.C.

10. In Finance Docket No. 28583 (Sub-No. 9F), the Chicago and North Western Transportation Company application for trackage rights over Burlington Northern, Inc. between East Minneapolis, MN, and East Superior, WI, is dismissed.
11. In Finance Docket No. 28583 (Sub-No. 10F), the application of William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc. between Lincoln and Havelock, NE was dismissed.[4]
12. In Finance Docket No. 28583 (Sub-No. 11F), the application of William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, debtor, for trackage rights over the Colorado and Southern Railroad Company between Denver and Golden, CO, is denied.
13. In Finance Docket No. 28583 (Sub-No. 12F), the application of William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc., between Ottawa and Streator, IL, was dismissed.[5]
14. In Finance Docket No. 28583 (Sub-No. 13F), the application of Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc. between Terry, MT, and Spokane, WA, was dismissed.[6]
15. In Finance Docket No. 28583 (Sub-No. 14F), the application of Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc. between Tacoma and Chehalis, WA, was dismissed.[6]
16. In Finance Docket No. 28583 (Sub-No. 15F), the application of Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc., between Miles City, MT, and all present and future coal mines located on BN in Montana was rejected.[6]
17. In Finance Docket No. 28583 (Sub-No. 16F), the application of Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc. between Council Bluffs, IA, and Kansas City, MO, was dismissed.[7]
18. In Finance Docket No. 28583 (Sub-No. 17F), the application of Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc. between Bellingham and Cherry Point, WA, was dismissed.[8]
19. In Finance Docket No. 28583 (Sub-No. 18F), the Southern Pacific Transportation Company application for trackage rights over Burlington Northern, Inc., and the Union Pacific Railroad Company, between the connection of BN and the Portland Terminal Railroad Company and (1) trackage serving North Rivergate and (2) the Barnes Yard of Union Pacific Railroad Company, as amended, is denied.

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[4]The decision to dismiss this proceeding was made November 29, 1978, and served December 5, 1978.

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]The decision to reject this application was made August 18, 1978, and served August 25, 1978.

[9]The decision to dismiss this proceeding was made November 29, 1978, and served December 5, 1978.

[10]*Id.*

20. In Finance Docket No. 28583 (Sub-No. 19F), the Atchison, Topeka and Santa Fe Railway Company application for trackage rights over the St. Louis-San Francisco Railway Company between Tulsa and Oklahoma City, OK, is dismissed.
21. In Finance Docket No. 28583 (Sub-No. 20F), the Montana Wheat Research and Marketing Committee application for Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, to obtain trackage rights over Burlington Northern, Inc., lines in Montana was rejected.[9]
22. In Finance Docket No. 28583 (Sub-No. 21F), the Wyo-Ben, Inc., application for Stanley E. G. Hillman, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, to obtain trackage rights over Burlington Northern, Inc., between Billings, MT, and Shobon, WY, was rejected.[10]
23. In Finance Docket No. 28583 (Sub-No. 22F), the application of Richard B. Ogilvie, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc. between Miles City, MT, and Big Sky and Kuehn, MT, is denied.
24. In Finance Docket No. 28583 (Sub-No. 23F), the Illinois Central Gulf Railroad Company application for terminal operations over the Missouri Pacific Railroad Company in Memphis, TN, is denied.

Christian Campbell, Eric Cunningham, Donald Engle, Frank Farrell, John Haley, Martin Lucente, G. Paul Moates, Nicholas P. Moros, and *James Walker* for applicants Burlington Northern, Inc. and St. Louis-San Francisco Railway Company.

James Armstrong for the Department of Defense.

Barbara Anthony, Arthur Federman, Joen Grant, and *Cristy Passman* for the Department of Justice.

James Baxendale, Robert Heath, and *Diane Liff* for the Department of Transportation.[11]

Toby Dress for the Interstate Commerce Commission, Section of Energy and Environment.

Michael Blaszak, Harry DeLung, Milton Nelson, Craig Smetko, and *Dennis Wilson* for Atchison, Topeka and Santa Fe Railway Company.

Louis Duerinck, Stuart Gassner, Christopher Mills, and *Anne Valle* for Chicago and North Western Transportation Company.

Sarah Holzsweig, Thomas Ploss, and *William Sippel* for Richard B. Ogilvie, trustee of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor.

Martin Cassell, Nicholas Manos, and *Don McDevitt* for William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, debtor.

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[9]The decision to reject this application was made August 18, 1978, and served August 25, 1978.
[10]*Id.*
[11]DOT did not cross-examine witnesses, present evidence, take a position, or file a brief in these proceedings. It will not be mentioned again in this decision.

Fritz Kahn and *Kendall Sanford* for Denver and Rio Grande Western Railroad Company.

John Adams and *Howard Koontz* for Illinois Central Gulf Railroad Company.

Philip Brown for Kansas City Southern Railroad Company.

Michael Roper, Harry Silleck, and *William Thie* for Missouri-Kansas-Texas Railroad Company.

Leon Leighton for Missouri Pacific Railroad Company.

Emreid Cole and *Edward Tannen* for Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, Clinchfield Railroad Company, Georgia Railroad, Atlanta and West Point Railroad Company, and Western Railway of Alabama.

F. W. Crouch, Robert Gehrz, and *C. Harold Peterson* for Soo Line Railroad Company.

Charles Burkett, Marc Feldman, Carol Harris, and *Jane White* for Southern Pacific Transportation Company and St. Louis Southwestern Railway Company.

R. Allen Wimbish for Southern Railway Company.

Joseph Adams, William Higgins, Peter Hohenhaus, Mark Kalafut, James Lowe, and *John Weisser* for Union Pacific Railroad Company.

T. Scott Bannister for the Iowa Department of Transportation, Transportation Regulation Board.

Richard Friedman and *Harold Mesirow* for the Illinois Department of Transportation.

John Finnigan for the Nebraska Public Service Commission.

David Tilstola for the North Dakota Public Service Commission.

William Hickey and *Thomas Woodley* for the Railway Employees' Department, AFL-CIO.

John Clark, Joseph Guerrieri, and *William Mahoney* for the Railway Labor Executives' Association.

Gordon MacDougall for John W. McGinness, Illinois Legislative Director of the United Transportation Union and M. S. Stuckey, general chairman of United Transportation Union on Illinois Central Gulf Railroad Company.

M. M. Winter for the United Transportation Union.

James Irlandi for Garvey, Inc.

Jon Hansen for the Kansas City Board of Trade.

Mike Miller for the North Dakota State Wheat Commission.

Griffin Dorschel for the Wisconsin Power and Light Company.

John O'Neil, pro se.

DECISION

BY THE COMMISSION:

INTRODUCTION

Burlington Northern, Inc. (BN or Burlington) and the St. Louis-San Francisco Railway Company (SLSF or Frisco), common carriers by railroad with principal offices at St. Paul, MN, and St. Louis, MO, respectively, propose to merge Frisco into Burlington. The resulting entity will be a single railroad operating over more than 29,000 miles of track through the northern tier of States between the Pacific Northwest and the Great Lakes, and between the Great Lakes and the Gulf of Mexico.

The merger proposal is contained in: (1) a joint application filed by BN and Frisco on December 28, 1977, seeking authority for the merger under 49 U.S.C. 11343, *et seq.*; (2) a concurrently filed application under 49 U.S.C. 11301 in which BN seeks authority to issue certain securities and to assume certain obligations and liabilities in connection with the proposed merger; and (3) an application filed January 16, 1978, under 49 U.S.C. 11343, *et seq.* in which BN seeks authority to acquire control of Frisco's wholly owned motor carrier subsidiary, Frisco Transportation Company (FTC). We accepted these applications for filing on January 27, 1978, and published an appropriate notice in the Federal Register.[12]

In that notice we waived an initial decision by the Administrative Law Judge, and determined that the merits of these applications would be decided in the first instance by the entire Commission.[13]

Public hearings were conducted by Administrative Law Judge Paul J. Clerman, on a consolidated record, beginning May 16, 1978, and concluding June 28, 1979. The record was closed and certified to us on October 24, 1979. On November 14, 1979, we held oral argument on specific issues in these proceedings. In all, the record reflects 46 days of hearing, comprising 8,370 pages of transcript and 222 exhibits received in evidence.

Appendix B identifies the related proceedings embraced in this decision. The position of parties in these proceedings is summarized later in this decision.

Burlington is the largest railroad system in the United States in miles of road operated, and the second largest in transportation revenues.[14]

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[12] 43 F.R. 3799 (1978).

[13] 49 U.S.C. 11345(e).

[14] For the years 1976-1978.

In its present form Burlington commenced operations in March 1970, following the merger of its predecessors, The Great Northern Railway (GN), Northern Pacific Railway (NP), Chicago, Burlington and Quincy Railroad (CB&Q), and other subsidiary lines, which was approved by the Commission.[15] As a system, BN and its subsidiaries operate over almost 25,000 miles of track serving points in 19 States and two Canadian provinces. Its lines extend generally between Chicago, IL, and St. Louis, MO, in the east; Houston and Galveston, TX, in the south; Duluth, MN, Superior, WI, and Winnipeg, Manitoba, and Vancouver, British Columbia, in the north; and Seattle, WA, Portland, OR, Bieber, CA, and Denver, CO, in the west. Its principal routes are between: Denver and Chicago via Lincoln, NE; Chicago and the Pacific Northwest via Minneapolis and St. Paul, MN, Omaha, NE, and Billings, MT; Seattle and Portland and Vancouver, British Columbia and northern California via Wishram, WA; Lincoln and Laurel, MT via Alliance, NE; and Spokane and Portland. BN's facilities, equipment, traffic, and financial data are described in appendix D.

BN and subsidiaries connect with Frisco primarily at Dallas-Fort Worth, Kansas City, and St. Louis, MO. Frisco and a subsidiary operate over some 4,700 miles of track in nine States. Frisco's lines generally extend between Kansas City and St. Louis in the north; Dallas and Fort Worth, TX, Mobile, AL, and Pensacola, FL, in the south; Quanah, TX, in the west; and Birmingham, AL, in the east. Its principal routes are between: Kansas City and Birmingham via Springfield and Memphis; St. Louis and Dallas-Fort Worth via Springfield and Tulsa; Kansas City and Tulsa, OK; Amory, MS, and Pensacola, FL, and Mobile, AL; and St. Louis and Memphis, TN. Frisco's facilities, equipment, traffic, and financial data are described in appendix E.

The merger was initially conceived by senior management officials of BN, in a continuing search for ways to strengthen their system. They recognized that an end-to-end merger with Frisco would provide BN access to the "Sunbelt," the Southeastern and Southwestern States in which economic growth and development are said to be occurring at the highest rate. A merger was suggested to the chairman and chief executive officer of Frisco on January 27, 1977. A joint study team was established to investigate the potential benefits to the shareholders, employees, and public from a unification of the two systems. It reported that the consolidation was

[15] *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967), sometimes referred to as the *Northern Lines Merger*.

likely to produce significant service and financial benefits. An agreement in principle was reached, which was approved by the two boards of directors on September 23, 1977. A final merger agreement was executed December 5, 1977. The agreement provides for BN to be the surviving corporation. The merger agreement was approved by the respective stockholders of BN and Frisco in May 1978.

THE APPLICANTS

BURLINGTON NORTHERN, INC.

BN is a diversified transportation and natural resources company. It was incorporated in Delaware as the Great Northern Pacific & Burlington Lines, Inc. (GNP&B) in 1961. The present name was adopted in 1970 after consummation of the *Northern Lines Merger*. BN and its predecessors have conducted railroad operations continuously since 1849.

BN's transportation activities encompass rail, truck and airfreight forwarding operations. Truck operations conducted by BN Transport, Inc. (BN Transport) and Hart Motor Express, Inc. (Hart Motor) provide motor carrier freight service in 15 Midwest and Western States. Burlington Northern Air Freight (BN Air), a wholly owned subsidiary, provides airfreight forwarding service. BN also engages in real estate and land development through subsidiaries.

Scope of operations.—BN and its subsidiaries operate a 24,950-mile rail system serving the States of California, Colorado, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming, and the Canadian Provinces of British Columbia and Manitoba. The principal rail subsidiaries are Colorado and Southern Railway Company (C&S), Fort Worth and Denver Railway Company (FW&D), Oregon Trunk Railway (OT), Oregon Electric Railway Company (OE), and Walla Walla Valley Railroad Company (WWV). Main and branch line mileages are shown below:

TABLE 1

BN system main line and branch line mileage (1976)

Carrier	Main line	Branch line	Total
BN	12,373	10,297	22,670
C&S	593	90	683
FW&D	1,241	0	1,241
OT	152	0	152
OE	142	43	185
WWV	19	0	19
Total system	14,520	10,430	24,950

BN operates intercity rail passenger service under contract for Amtrak between (1) the Twin Cities and Seattle; (2) Duluth, MN and the Twin Cities; and (3) Portland and Seattle and Vancouver, British Columbia. In addition, BN provides commuter service between Chicago and Aurora, IL, under an agreement with the Regional Transportation Authority.

BN and Frisco interchange at St. Louis and Kansas City, MO. BN's subsidiary FW&D interchanges with Frisco at Quanah, Irving, Fort Worth, and Dallas, TX, and with Frisco's subsidiary the Quanah, Acme and Pacific Railroad Company (QAP) at Quanah. Other major BN interchange points include Chicago; Denver; Portland; Minneapolis; Grand Island, NE; Bieber; and Peoria, Centralia, and Eola, IL.

In 1976 BN and its subsidiaries owned or leased a total of 112,810 cars. These were comprised of: 50,652 boxcars; 10,064 gondola cars; 17,716 open hopper cars; 15,825 covered hopper cars; 5,384 refrigerated cars; 2,321 stock cars; 218 tank cars; 8,547 flatcars and 2,083 miscellaneous cars.

The top five commodities handled by BN in 1976 were coal, farm products, lumber and wood products (except furniture), food and kindred products, and chemicals and allied products.

In 1976 BN and its subsidiaries handled 2,724,438 carloads. They carried 171,700,000 revenue tons over 89,780,124,000 revenue ton-miles, generating $1,628,907,000 in freight revenue.

The five largest origin points of traffic on BN and its subsidiaries in 1976, in order, were Decker, MT, Chicago, IL, Colstrip, MT, Belle Ayr, WY, and Kuehn, MT. The five largest termination points

on BN and its subsidiaries in 1976, in order, were Alloredoc, WI, Minneapolis, MN, Seattle, WA, Superior, WI, and Chicago, IL.

BN operates 25 run-through trains, all but 4 of which are unit coal trains. The run-through trains are listed in appendix D. BN has no preferential solicitation agreements with any other railroad.

BN owns all of the outstanding stock of the following seven carriers: Burlington Northern (Manitoba) Limited; Burlington Northern Dock Corporation; BN Transport, Inc.; Oregon Electric Railway Company; Oregon Trunk Railway; Spokane, Portland and Seattle Railway Company; and Walla Walla Valley Railroad Company.

BN also owns, directly or indirectly, stock in the following 29 carriers: The Belt Railway Company of Chicago (7.69 percent); Butte Pipe Line Company (10.00 percent); Camas Prairie Railroad Company (50.00 percent); Chicago Union Station Company (25.00 percent); the Colorado and Southern Railway Company (90.57 percent); Davenport, Rock Island and North Western Railway Company (DRI&NW) (50.00 percent); Delta Alaska Terminal Ltd. (66.67 percent); Denver Union Terminal Railway Company (33.34 percent); Fort Worth and Denver Railway Company (99.97 percent); Galveston Terminal Railway Company (50.00 percent); Houston Belt and Terminal Railway Company (12.50 percent); Illinois Terminal Railroad Company (9.09 percent); Iowa Transfer Railway Company (25.00 percent); Kansas City Terminal Railway Company (8.34 percent); Keokuk Union Depot Company (40.00 percent); The Lake Superior Terminal and Transfer Railway Company (66.67 percent); Longview Switching Company (33.33 percent); Minnesota Transfer Railway Company (33.33 percent); National Railroad Passenger Corporation (36.00 percent); Paducah and Illinois Railroad Company (33.33 percent); Portal Pipe Line Company (50.00 percent); Portland Terminal Railroad Company (40.00 percent); Pueblo Union Depot (25.00 percent); the Pullman Company (2.97 percent); the St. Paul Union Depot Company (40.20 percent); Terminal Railroad Association of St. Louis (6.25 percent); Trailer Train Company (7.32 percent); Western Fruit Express Company (97.14 percent); and Winona Bridge Railway Company (66.67 percent).

BN also owns 18 noncarrier companies, either directly or indirectly. They are: Arden Lumber Company, Inc. (100.00 percent); BNL Development Corporation (100.00 percent); Burlington Equipment Company (100.00 percent); Burlington

Northern Air Freight, Inc. (100.00 percent); Burlington Northern Air Freight (Australian) PTY. Ltd. (99.99 percent); Dreyer Bros., Inc. (100.00 percent); Glacier Park Company (100.00 percent); Great Midwest Corporation (49.35 percent); Ksanka Lumber Co., Inc. (100.00 percent); Lemhi Telephone Company (100.00 percent); Midwest Precote Company (100.00 percent); Northern Airmotive, Inc. (100.00 percent); Plum Creek Lumber Company (100.00 percent); Royal Logging Company (100.00 percent); Ruth Realty Company (100.00 percent); Saxony Corporation (100.00 percent); Underground Development Company (100.00 percent); and Universal Pipeline Constructors Inc. (100.00 percent).

These companies comprise BN's natural resources and corporate divisions. The natural resources division includes responsibility for forest products (including timber sales), oil and gas, coal and minerals, and agricultural land development. The corporate division overseas commercial land development, local telephone service, and fixed base aircraft sales and service.

On May 11, 1978, BN shareholders adopted a resolution approving the merger, subject to Commission approval. Of 10,227,413 shares voting (79.6 percent of total outstanding), 8,883,980 shares (69.1 percent of voting shares) were voted in favor of the merger.

As of December 31, 1976, BN properties were valued at $3,451,013,257.

BN is able to utilize several routes through the northern and central corridors. It is able to penetrate many transportation markets, originate most of the traffic handled, and serve most of the important gateways in the northern half of the western district. It possesses a large freight car fleet and enjoys long average hauls in a territory largely free of terminal congestion other than at the carrier's eastern gateways.

Since 1970, the carrier has compiled a good traffic and revenue growth record. Coal traffic has become increasingly important to the railroad. Coal accounted for 5.3 percent of freight revenue in 1970, increasing to 17.5 percent in 1976. During the past several years, BN has continuously increased its market share in terms of revenue ton-miles.

The financial strength of BN is due in large measure to the existence and development of its nonrail assets. The carrier owns in fee nearly 2.4 million acres in the mountain and Northwestern States and holds mineral rights on an additional 5 million acres. Revenues derived from the mining of taconite, coal, and other minerals, the

production of oil and gas, and the harvesting of forest products have become important sources of income during recent years.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Frisco was incorporated in Missouri in 1916 as the successor of the St. Louis and San Francisco Railroad Co. Frisco operates a rail system in nine States. The system includes the QAP, a wholly owned subsidiary, which operates a rail line through the Texas Panhandle to a connection with the Santa Fe. The Frisco's wholly owned motor carrier subsidiary, FTC, operates over routes generally paralleling the Frisco's rail lines in Missouri and it holds operating rights over other routes in Arkansas, Tennessee, Mississippi, Oklahoma and Texas. Frisco owns two land companies whose primary purpose is to acquire and develop property for the location of traffic-producing industries along the lines of the rail system. Frisco also owns approximately 50.04 percent of the stock of the New Mexico and Arizona Land Company (New Mex.).

Frisco and QAP operate 4,710 miles of track within the States of Alabama, Arkansas, Florida, Kansas, Mississippi, Missouri, Oklahoma, Tennessee, and Texas. The main line mileage totals 3,601 miles, of which 56 are leased. Frisco's branch line mileage totals 1,109 miles, of which 73 are operated under trackage right agreements.

As stated earlier, Frisco interchanges with BN at Kansas City and St. Louis, and with FW&D at Dallas, Irving, Fort Worth, and Quanah, TX. QAP connects with FW&D at Quanah. Other major Frisco interchange points include Birmingham, Memphis, and Avard.

In 1976 Frisco owned or leased 18,548 cars consisting of: 8,847 boxcars; 1,276 flatcars; 2,620 gondola cars; 2,601 open hopper cars; 3,102 covered hopper car; 100 refrigerator cars; and 2 tank cars.

Frisco and its subsidiary handled 773,437 carloads. This resulted in 40,544,103 revenue tons traveling 14,563,803,000 revenue ton-miles and generating $318,625,605 of gross freight revenue.

In 1976, the five major commodities transported on Frisco and its subsidiaries were: food and kindred products; chemicals and allied products; transportation equipment; farm products; and pulp, paper and allied products.

The major revenue carload origin points for Frisco in 1976, in order were: Memphis, TN; Valley Park, MO; Tulsa, OK; Catale, OK; and St. Louis, MO. In that same year Frisco's six major revenue

carload termination points in order were: Memphis, TN; Springfield, MO; Kansas City, MO; Rush Tower, MO; Oklahoma City, OK; and Dallas, TX. If the Dallas-Fort Worth-Irving, TX area is considered one termination point, it becomes the second largest on the Frisco system. Additionally, if Kansas City, KS, and Kansas City, MO, are considered together they become the third largest termination point on Frisco.

Frisco participates in 17 run-through train operations. Six of these involve unit coal trains and two are in one direction only. A list of these trains is in appendix E.

Frisco has no preferential solicitation agreements with other railroads.

Frisco has an interest in eight other carriers: The Terminal Railroad Association of St. Louis (6.25 percent); Illinois Terminal Railway Company (9.09 percent); Kansas City Terminal Railway Company (8.33-1/3 percent); the Pullman Company (1.1562 percent); Quanah, Acme and Pacific Railroad Company (100.00 percent); Trailer Train Company (2.44 percent); Wichita Union Terminal Railway Company (33.33-1/3 percent); and Frisco Transportation Company (100.00 percent).

Frisco also has an interest in four noncarrier companies: Clarkland, Inc. (100 percent); Clarkland Realty, Inc. (100 percent); 906 Olive Corporation (100 percent), and New Mexico and Arizona Land Company (50.04 percent).

Frisco shareholders met on May 9, 1978, to vote on the merger. There were 2,349,995 shares (89.53 percent of the total shares outstanding) represented. Of the total shares, 2,116,735 (80.64 percent of the total and 90.07 of those present) voted for the merger, while 67,961 (2.58 percent of the total shares outstanding) voted against the merger.

As of December 31, 1976, Frisco properties were valued at $673,962,652. This includes 533,770.48 shares of New Mex, which Frisco valued at $14,211,639 based on the American Stock Exchange quotation on that date. As of December 31, 1979, New Mex was selling at over $28 per share, after having split 2-for-1 in July 1978. The valuation of Frisco's New Mex stock would now be nearly $30 million.

TRANSACTION

Terms.—The terms of the agreement provide for all assets and businesses of Frisco to be absorbed by BN; BN will assume all the

debts, liabilities and other obligations of the Frisco. Frisco nominees will constitute the greater of five or 20 percent of the surviving company's board of directors.

Each share of Frisco common stock will be converted into 0.95 share of BN common stock and one-half share of BN $2.125 no par value preferred stock, $25 redemption value (new preferred stock). The holders of the new preferred stock will receive fully cumulative dividends at the rate of $2.125 per share per annum, payable quarterly. Fractional shares of BN common stock shall not be issued; holders of fractional shares will receive a cash equivalent. A mandatory sinking fund commencing in the 6th year from issuance is designed to retire all the new preferred stock by the end of the 20th year. The new preferred stock is callable on or after the fifth anniversary of the issuance.

The merger agreement may be terminated for various reasons. The agreement provides that if the Commission imposes any conditions on its approval of the merger, the conditions, if accepted by resolutions of the boards of directors of BN and Frisco, shall be deemed to be as binding as if included in the agreement. However, the boards of directors may not accept (without first obtaining the approval of the holders of the requisite number of shares of affected stock) any conditions which would vary or change: the exchange ratios; the dividend rate of or redemption provisions applicable to the new preferred stock; or the financial structure of the surviving corporation.

Securities.—BN currently has 25 million shares of common stock authorized, of which 12,500,569 are outstanding. This excludes: 1,181,818 shares which have been initially reserved for issuance pursuant to BN's 5.25 percent convertible debentures, due 1992; 580,545 shares reserved for issuance pursuant to BN stock option plans; 287,375 shares initially reserved for issuance on conversion of BN series A no par value preferred stock; 1,777,800 shares initially reserved for issuance for BN's $2.85 no par value convertible preferred stock; and 540 shares held in BN's treasury.

BN currently has 5 million shares of no par value preferred stock authorized, of which 2,344,850 shares are outstanding. This is composed of 2 million shares of $2.85 no par value convertible preferred stock and 344,850 shares of series A no par value preferred stock.

BN has reserved and intends to issue up to 2,560,791 shares of common stock in exchange for the Frisco stock. This is based on the

number of Frisco shares now outstanding, the number of shares subject to outstanding options, and the number of shares available for the future grant of options. BN also has reserved and intends to issue up to 1,347,785 shares of new preferred stock. The amount of the new preferred stock to be issued is based on the same number of Frisco shares described above.[16]

BN has estimated the commissions, expenses, and discount to be incurred in issuing the common and preferred stock to total approximately $300,000.

Assumption of obligations and liabilities.—In addition to issuing stock, BN will assume the obligations and liabilities of Frisco upon consummation of the merger. These include: (1) $57,391,000 principal amount of first mortgage bonds, series A, 4 percent, due January 1, 1997; (2) $13,902,000 principal amount of first mortgage bonds, series B, 4 percent, due September 1, 1980; (3) $5,400,000 principal amount of refunding and purchase money mortgage notes dated February 1, 1968; (4) 5-percent income debentures, series A, due after 1977; (5) remaining indebtedness, if any, on the Frisco equipment trust, series N (currently $800,037); and (6) the remaining indebtedness, if any, under Frisco equipment trust, series O (currently $900,045).

The series A bonds provide for annual sinking fund payments from available net income equal to: (a) 0.25 percent of the maximum principal amount of series A bonds theretofore authenticated and uncanceled (which was $73,385,000 at date of issue); or (b) interest on bonds acquired by operation of the sinking fund. The series B bonds provides for annual sinking funds payments from available net income of 1 percent of the maximum principal amount of such bonds heretofore authenticated (which was $19,500,000 on the date of issue). Both sinking funds' obligations in practice are satisfied by the purchase of bonds on the open market.

The series A bonds may be called at any time at premiums from 5.0 percent (prior to 1957) to 0.5 percent (1989-92); there is no premium after 1992. Series B bonds are callable at premiums from 3.25 percent (in 1955) to 0 percent (in 1979).

Encumbered by the refunding purchase money mortgage indenture is a 32.67-mile line extending from a connection with the Salem Branch of Frisco's line (approximately 1.75 miles north of Keysville, Crawford County, MO), in a southeasterly direction through Viburnum and Bixby to Buick, Iron County, MO. Under this

[16] This information was contained in a letter to the Commission dated October 29, 1979 from the applicants' attorney.

indenture the total issue of notes authorized is limited to an aggregate principal amount of $6 million. The interest rate is 6.75 percent and the notes are due August 1, 1992. Interest on the notes is payable semiannually. The notes are entitled to the benefit of a sinking fund designed to retire $150,000 principal amount of notes during each of the years 1973 through 1991. The notes are redeemable before maturity at premiums from 5.75 percent (in 1969) to 0.25 percent (in 1991). They are subject to redemption through operation of the sinking fund.

As of December 31, 1976, Frisco had two equipment trust agreements, series N and L outstanding. Series N covers 16 locomotives and 183 freight cars, bearing an interest rate of 4.25 percent and matures March 15, 1980. On December 31, 1976, the outstanding indebtedness under series N was $1,116,000. Series O covers 321 freight cars, bears an interest rate of 4.38 percent and matures on May 15, 1980. On December 31, 1976, outstanding indebtedness under series O was $1,260,000. Under both series, interest and principal installments are paid semiannually.

In addition, on December 31, 1976, Frisco had outstanding 80 conditional sales agreements covering 281 locomotives, 7,780 freight cars, and 80 enclosed auto racks. The unpaid conditional sales indebtedness was $114,791,000, none of which was in default. Interest rates vary from 4.45 percent to 10.12 percent with some interest related to the prime rate. Interest and principal payments are due annually or semiannually. With few exceptions, the term is 15 years. Maturity dates extend from November 1, 1977 to March 1, 1992.

Control of the motor carrier.—After the merger, BN will own the FTC. FTC is authorized to provide service over regular routes carrying general commodities (with the usual exceptions) between points in Arkansas, Missouri, Kansas, Tennessee, Mississippi, and Illinois. FTC operations are generally restricted to service which is auxiliary to or supplemental to Frisco rail service.

ALLEGED BENEFITS OF MERGER

Applicants contend that the proposed merger will result in improved quality and efficiency of the rail transportation services offered to shippers, together with increased utilization and productivity of applicants' human and physical assets. Further, the merger will result in an increased financial strength greater than the two applicants could achieve separately.

Efficiencies of the nature claimed are particularly beneficial in the railroad industry, which earned an average rate of return in 1976 (excluding Amtrak and AutoTrain) of only 1.97 percent. That of the western railroads was only 3.37 percent. For the same year, BN realized a 2.42 percent rate of return and Frisco a 4.6 percent rate of return. The roads typically identified as being in the strongest financial condition realized rates of return of only 5.92 percent (Union Pacific Railroad Company), 6.21 percent (Southern Railway Company), and 7.85 percent (Norfolk and Western Railroad Company).

APPLICANTS' UNDERLYING STUDIES

Background

Applicants undertook a series of studies of their traffic bases, operations, and overhead expenses. 1976 was used as the base year with which to compare anticipated effects of the merger in each of the 3 years following implementation.

The traffic diversion study, based on a sample of traffic settled during 1976, depicts volumes of cars or units by routes between specific origins and destinations, the tonnage involved, and the expected revenue gains to the merged system. Marketing personnel from BN and Frisco produced this study. BN personal studied its traffic that was geographically susceptible to movement over Frisco, FW&D, and C&S. Frisco and QAP personnel studied their traffic that was susceptible to movement over BN and its subsidiaries and also the traffic that was joint between the companies.

The operating study was subdivided into nine separate studies:

Common point consolidation;
Frisco operating divisional organization;
Routes and service;
Operating and train blocking plan;
Freight car equipment utilization;
Condition of roadway property;
Major shops and repair facilities;
Impact on passenger and commuter services; and
Communications.

The loaded freight cars, weights, origins, and destinations determined by the traffic study group were used by the operations study group to formulate computer programs to provide the

information for analyzing complete segment-by-segment operating requirements. The result indicated the specific amounts and locations of savings and costs to be incurred on the merged system. This same information was also used to calculate the additional gross revenues and the cost of handling added traffic. The costs were calculated using the Commission's Rail Form A costing formula. A concurrent study was undertaken to determine systemwide standards to be used on the merged system for rolling stock and fixed facilities and to meet various union, State, and other legal requirements.

The overhead study was undertaken to determine the changes necessary in each department of the merged companies for a 3-year period subsequent to merger. This and the operating study developed information for both nonunion and union positions. The overhead study also determined the estimated savings in insurance premiums and in data processing equipment rent and maintenance. A separate study determined a potential for reducing the cost of purchasing materials and supplies. An environmental impact report was developed to determine changes in property conditions, traffic densities, employee counts, and operations.

Traffic studies

The applicants' traffic studies were developed to determine the impact that the consolidation would have on applicants' traffic and revenue, as well as the impact on other carriers. Frisco prepared a study of its traffic, and BN prepared studies covering its traffic and that of FW&D and C&S. A complete analysis of this study is contained in appendix H. It estimated gross revenue changes resulting from diversion, summarized in table 2.

TABLE 2

Applicants' estimates of gains (losses) in gross revenue for other railroads[1]

Carrier[2]	Total	Carrier	Total	Carrier	Total
ACY	$(6,620)	EJ&E	$3,900	PLE	$(200)
ATSF	(6,712,400)	FEC	32,100	PW	(16,000)
BCE	1,600	FW&D	1,139,900	QAP	3,300
BM	(42,120)	GA	(14,540)	RFP	(600)
BO	(643,180)	GB&W	87,220	RSP	500
BS	(800)	GNA	4,900	SAN	300
CCO	(46,100)	GTW	365,100	SCL	1,271,940

See footnotes at end of table.

Applicants' estimates of gains (losses) in gross revenue for other railroads[1]—Continued

Carrier[2]	Total	Carrier	Total	Carrier	Total
CHV	400	HPTD	4,600	SN	(53,600)
MILW	(3,054,960)	ICG	(6,592,500)	SI	2,900
CN	(390,320)	ITC	(80,700)	SOO	(243,200)
CNL	(3,000)	KCS-L&A	(2,027,420)	SOU	(7,925,260)
CNW	(1,895,180)	L&N	(6,469,700)	SP	(2,047,620)
CO	81,700	LNW	800	SS	2,800
CP	2,580	MBRR	(360)	SSLV	100
CR	(2,494,000)	MCR	3,700	SSW	(1,432,320)
CRIP	(4,504,680)	MDW	(2,700)	TM	100
C&S	(1,691,420)	MEC	(6,880)	TOE	(540)
DH	3,000	MKT	(6,531,180)	TP&W	(4,800)
DM	1,500	MN&S	(100,300)	UP	(5,855,660)
DQE	(2,760)	MP[3]	(7,748,740)	VTR	(3,000)
D&RGW	1,426,200	MTW	1,600	WA	(3,680)
DS	(13,400)	N&W	(2,083,800)	WM	(25,300)
DT&I	(68,100)	NWP	(3,300)	WP	(166,600)
DVS	(2,000)	OE	14,800	WSS	1,500
DW&P	(82,600)	OT	(8,900)		

[1]No gains or losses were anticipated for carriers by other modes.
[2]The carrier abbreviations are identified in appendix A.
[3]Includes C&EI and T&P.

After estimating the changes in gross revenue resulting from the diversion of traffic from other carriers and internal rerouting between applicants and their subsidiaries, applicants determined the net revenue gains or losses after deducting the "cost of handling" such traffic. Table 3 displays the estimates of gross revenue gains (losses), cost of handling, and net revenue gains (losses) for a merged BN-Frisco and each of its rail subsidiaries.

TABLE 3

Applicants' estimated net benefits from diverted traffic

	BN-Frisco	FW&D	C&S	OE	OT	QAP	Total
				Thousands			
Gross freight revenue	$66,644	$1,140	$(1,691)	$15	$(9)	$3	$66,102
Costs	48,545	927	(1,398)	30	———	———	47,904
Net revenue[1]	18,099	213	(93)	(15)	(9)	3	18,198

See footnote at end of table.

Applicants' estimated net benefits from diverted traffic—Continued

	BN-Frisco	FW&D	C&S	OE	OT	OAP	Total
			Thousands				
Less: added net cost of TRRA service at St. Louis	$1,342						$1,342
Grand total[1]	16,757	$213	$(93)	$(15)	$(9)	$3	16,856

( ) Indicates loss or contra item.
[1]May not agree due to rounding.

As shown earlier in table 1, the $16,856,000 in annual benefits is estimated to be realized fully for the first time in the third year following the merger.

Cost studies (traffic)

The unit costs in the analysis were derived from a combined BN-Frisco-C&S-FW&D 1976 analysis using the ICC Rail Form A cost formula. There were 2,037 sample movements costed, of which only 23 were not calculated by computer. A detailed analysis of the costing by all parties appears in appendix I.

Changes in mileage and interchange switching, if any, caused by rerouting, together with any changes in origin and destination terminal operations were determined for each movement. Utilizing the foregoing service change data, changes in equipment turnaround time were calculated. Per diem/mileage rates were calculated using average age and average cost per car for each Association of American Railroads (AAR) car type, based on 1976 rates. Unit costs and empty return ratios were taken directly from the combined BN-Frisco-C&S-FW&D Rail Form A analysis.

The principal cost elements studied included expense per gross ton-mile, expenses related to line hauls, interchange switching expense, intertrain switching (intermediate on-line switching between trains or switch moves on one train) expense, terminal switching and station clerical expenses, loss and damage, car ownership costs, and "special cost items." The latter were van-related costs in trailer-on-flatcar (TOFC) service, mechanical

refrigerator inspection costs, and switching charges by the Terminal Railroad Association of St. Louis (TRRA).

The cost estimates derived from the foregoing studies are shown in: table 3, for diverted traffic including added costs for service from the TRRA at St. Louis; in table 6, (item (h)), for unchanged joint traffic and certain costs avoided at St. Louis for TRRA services; and also in table 6 (item (j)), for avoided equipment utilization costs.

Similar procedures were used to determine avoided costs ($418,960 annually) resulting from shorter hauls of (1) new rail to the rail welding plant at Springfield and (2) welded rail from the plant to installation sites. These avoided costs are included in item g of table 6.

Operating studies

A series of studies were undertaken by applicants to determine the changes in operations necessary to accommodate the proposed transaction. The shifts in traffic flow were determined by analyzing the new routings for diverted traffic, internal reroutings, and unchanged joint traffic (traffic now interchanged between the Frisco and BN systems which is not subject to diversion but which will have the interchange eliminated), referred to collectively as the "through traffic pool."

Table 4 shows the estimated number of carloads in this pool. The "Diversion study" carloads reflect new traffic (traffic diverted from other carriers to the merged system) and reroutings of diverted traffic between the merged company and its subsidiaries. For example, a car which formerly moved by FW&D, Frisco, and a connecting carrier is diverted from the connecting carrier to a new route comprised of the (former) Frisco and BN, eliminating both the connecting carrier and FW&D as participants and adding BN as a participant.

TABLE 4

Components of the through-traffic pool

Source	Carload impact on		
	BN Frisco	Frisco-FW&D	Total
Diversion study:			
BN	99,250	----------	99,250
Frisco	72,360	6,100	78,460
FW&D	1,050	4,770	5,820
C&S	60	----------	60
Total	172,720	10,870	183,590 (77%)
Unchanged joint traffic	38,500	15,600	54,100 (23%)
Total through traffic	211,220	26,470	237,690 (100%)
Pool---------- percent	(89%)	(11%)	

To select the routes capable of providing the best service, alternate routes were evaluated on the basis of their physical characteristics, the desirability of routing via Kansas City or St. Louis, an appraisal of the approximate transit times, and existing traffic levels. The following list identifies (1) the principal routes to be used for the through-traffic pool between Frisco's major terminals of Tulsa and Memphis, and BN's major terminals of Galesburg, Chicago, Minneapolis, Lincoln, Denver, Laurel, Minot and Spokane, and (2) the principal routes presently used for unit coal trains.

(1) *Proposed principal routes in the major traffic flow corridors*

Traffic corridor	*Route*
Between Memphis and:	
Galesburg	via St. Louis and West Quincy
Chicago	via St. Louis and Galesburg
Minneapolis	via St. Louis and Galesburg
Lincoln	via Kansas City
Denver	via Kansas City and Lincoln
Laurel	via Kansas City and Lincoln
Minot	via Kansas City and Willmar
Spokane	via Kansas City and Minot
Between Tulsa and Springfield and:	
Galesburg	via Kansas City and West Quincy
Chicago	via Kansas City and Galesburg
Minneapolis	via Kansas City and Willmar
Lincoln	via Kansas City

(1) *Proposed principal routes in the major traffic flow corridors*—Continued

Traffic corridor	*Route*
Denver	via Kansas City and Lincoln
Laurel	via Kansas City and Lincoln
Minot	via Kansas City and Willmar
Spokane	via Kansas City and Minot

(2) *BN/FW&D/C&S routes carrying unit coal trains (June 1, 1978)*

Traffic corridor	*Route*
Between Huntley, MT and:	
Kansas City	via Alliance and Lincoln, NE; Napier, KS; and St. Joseph, MO
Dallas	via Alliance, NE; Brush and Denver, CO
Twin Cities	via Glendive, MT; Casselton, ND; Willmar, MN
Duluth/Superior	via Glendive, MT; Casselton, ND; Staples, MN
Gunn, MN	via Glendive, MT; Casselton, ND; Fargo, ND; Grand Forks, ND; Bemidji, MN
Between Fargo, ND and Fergus Falls, MN	
Between Twin Cities and St. Louis	via Dubuque, IA; Galesburg, IL; Burlington, IA
Between Galesburg and Paduach	via Bushnell and Concord, IL; Shattuc, IL
Between Fargo, ND and Fergus Falls MN	
Between Twin Cities and St. Louis	via Dubuque, IA; Galesburg, IL; Burlington, IA
Between Galesburg and Paduach	via Bushnell and Concord, IL; Shattuc, IL
Between Galesburg and Chicago	via Aurora, IL
Between Chicago and Denver	via Galesburg, IL; Creston, IA; Lincoln and Oxford Jct., NE; Brush, CO
Between St. Louis and Shattuc, IL	
Between Galesburg and Peoria	

The following routes or route segments would remain primarily as coal routes after merger:

Between Huntley, MT and Casselton, ND	via Glendive, MT
Between Casselton, ND and Twin Cities	via Staples, MN
Between Fargo, ND and Bunn, MN	via Grand Forks, ND and Bemidji, MN
Between Galesburg and Paduach	via Bushnell, Concord, and Shattuc, IL
Between St. Louis and Shattuc, IL	
Between Alliance, NE and Brush, CO	via Northport, NE
Between Denver and Dallas	via Texline, TX
Between Ashland, NE and Galesburg	via Creston, IA

It was determined that there will be 12,000 loads and 9,720 corresponding return empties, or 21,720 cars presently interchanged annually between BN and Frisco that will be handled via shorter routes on the merged company. This determination was based on analysis of 31 percent of a total of 385 study movements. Use of the shorter routes on the consolidated company will result in a net reduction of 1,130,913 car-miles and savings in transportation costs of $630,539 annually begining in the first year of merger. (See table 6, item (h).)

The reduction in freight car time/mileage costs resulting from the elimination of interchange between the merging carriers at St. Louis and Kansas City will produce an annual saving of $480,332, and the reduced use of TRAA services at St. Louis will produce an annual saving of $26,188 in the first year of merger (table 6).

The change in the number of cars (4,525 additional through Kansas City, with a like reduction through St. Louis) results from the rerouting to use shorter internal routes. In addition to the cost savings considerable savings in transit time will result. Applicants believe the time saved will result in quicker turnaround of equipment, thereby improving equipment utilization.

Applicants conclude that the major gateways to realize increased traffic are Birmingham, Memphis, Tulsa, and Chicago. The Centralia-Woodlawn gateway will realize decreased traffic, but BN states that service at these gateways will be at least equal to what it is presently. However, there will be a reduction of one train daily in each direction on the Galesburg-Centralia route.

There are 183,590 carloads annually in the diverted traffic base, including 172,720 between BN-Frisco and 10,870 between FW&D-Frisco (see table 4). Of this total, 73,290 carloads are "new" to the BN and 105,130 carloads are "new" to the Frisco. Applying an 81 percent empty return factor, the total annual increase would be 158,445 cars on the BN and 164,495 cars on the Frisco, beginning in the third year of merger.

On the Frisco, the additional traffic would be concentrated on the main traffic corridors between Birmingham-Memphis and St. Louis-Kansas City, and between Tulsa and Kansas City. On the BN, the new traffic would be concentrated on the St. Louis-Galesburg, Kansas City-Chicago, and Kansas City-Lincoln corridors. Other additional traffic is widely dispersed throughout the system.

Applicants expect no delay or impact upon commuter or passenger operation. On the BN, passenger commuter service is operated between Chicago and Aurora, IL, with approximately 68

commuter trains operated daily, primarily between the hours of 6 a.m. and 6 p.m. After merger there will be two additional freight trains operated on this line between Cicero Yard and Aurora, scheduled between the hours of 6 p.m. and 6 a.m when commuter operation is minimal.

The following BN line segments carry Amtrak passenger trains and are segments on which additional freight train operation is scheduled as result of merger:

Line segment	*Number of Amtrak trains daily*
Chicago-Galesburg, IL	4
Galesburg, IL-West Quincy, MO	2
Willmar-Breckenridge, MN	2

Applicants state that the schedules of the added freight trains will not conflict with Amtrak operations.

No Amtrak, passenger, or commuter service is operated on Frisco.

Applicants believe that the merged company would offer substantial service improvements to both its on-line customers and to many of the customers of its connecting railroads. The merged company would provide single-line service from such major southeastern traffic generating points at Birmingham, Memphis, and Mobile to the northwestern points of Portland, Seattle, and Vancouver (British Columbia); and from the Chicago gateway to Tulsa, Oklahoma City, Dallas-Fort Worth, Houston, and Galveston. Consolidations of traffic flows would enable the movement of trains over longer distances with no need for interchange and with minimal en route switching.

Applicants acknowledge that they will exert their best efforts toward obtaining longer hauls over the merged single-line routes where possible. Nonetheless, they expect to maintain existing gateways and joint routes with connecting carriers, and anticipate that traffic will continue to move via such gateways and routes where service considerations dictate. For example, applicants believe that certain traffic moving in connection with UP at Kansas City between the Pacific Northwest and Memphis and beyond will continue to be so routed because this route will be shorter and involve less transit time than the proposed BN-Frisco single-line route via Minot, ND . However, applicants will not guarantee per-merger traffic levels.

Applicants anticipate savings both in the resources required to serve the traffic and the time required to handle the shipments from

origin to destination. They believe that service reliability would also increase. They will route internal traffic over shorter routes without sacrificing long-haul divisions, but reducing transit time, switching, and interchanges. The merged system will have significantly greater control over the movement of individual shipments. Consolidation of computerized information systems for freight car location and distribution would give the merged company the ability to inform shippers of the location and the expected delivery date of shipments over a wider geographic area. In turn, this would enable the merged company to match the available supply of empty freight cars to shipper demands, thereby improving the ability to meet shippers' needs and the utilization of the combined equipment fleet, with a potential reduction in the amount of handling of certain shipments. Applicants believe that there would be an opportunity to reduce the incidence of loss and damage.

Applicants have concluded that the condition of road, yards, and terminals is adequate to handle the present and proposed traffic volumes and that no rehabilitation or upgrading is required. These property studies confirmed applicants' belief that their policies and practices are similar and compatible, and will not require any substantial change. Further, the studies of facilities and maintenance programs produced no opportunities for savings on the merged company except for rail welding. Expansion of rail welding facilities at Springfield is expected to cost $54,000, while annual recurring savings of $418,960 are expected from shorter hauls of both new rail and welded rail.

Applicants plan to upgrade 27 miles of Frisco track between Rosedale Yard in Kansas City and Paola, KS, at a cost of $556,475. They plan to accomplish two-thirds of the rail relay ($370,983) in the second year, and the balance ($185,492) in the third year of merger. (Table 6, item (i).) Applicants believe this will result in an increase in the allowable freight train speed and in increased line capacity sufficient to provide for the efficient movement of trains and the achievement of train schedules without delay.

In determining postmerger equipment requirements, applicants analyzed the availability of motive power and cabooses, the changed train services attendant to the changed traffic volumes, the pooling of the BN and Frisco locomotives and cabooses, and the requirements of the run-through train between Tulsa and Houston in connection with the FW&D. Of the routes over which more trains will be operated, only the Kansas City-Minot route restricts the locomotive size (to four-axle units because of the limited capacity of

the Missouri River Bridge at Sioux City). Anticipated new equipment acquisitions are shown below.

Equipment	Type and horsepower	Number of units	Cost per units	Total investment cost	Annual recurring cost
Locomotives	Four-axle 2,000 HP	14	$464,650	$6,505,100	$1,235,969
Do	Six-axle 3,000 HP	14	543,395	22,279,195	4,233,047
Cabooses	Cupola	17	43,500	739,500	140,505
Total				29,523,795	[1]5,609,521

[1]The annual recurring cost is included in table 6, item j.

Due to increased freight car equipment utilization resulting from the merger, applicants believe the merged company will be able to avoid the purchase of 800 freight cars in the future. Based on the 1976 car acquisition program, 3 years would be required to realize the full acquisition saving. Using the 1976 average cost for new equipment, an estimated $26,941,000 investment in new equipment would be avoided. Based on BN's estimated 1976 before-tax cost of capital (19 percent), investment cost savings $1,706,000 would be realized in the first year of merger, $3,440,000 in the second, and $5,118,600 in the third and each year thereafter.

Applicants assert that operation of the combined freight car fleet will permit greater flexibility in car management and more efficient use of cars. Specifically, the cross-haul of like equipment types, which generated approximately 11.9 million car-miles, can be reduced by minimizing the empty return of cars which are now under separate ownership and control. The reduced handling of empty cars would produce an annual car-mile savings of 5.8 million, which in turn would generate an annual savings in transportation costs of $887,504.

Applicants contend that the merged rail company would be enhanced by BN's nontransportation operations. These operations include the sale of timber and logs, the manufacture and sales of forest products, and the exploration, development and/or sale of petroleum, coal, and other natural resources. In addition, BN is engaged in airfreight forwarding, as well as fixed base aircraft operations and real estate development. Applicants state that such nontransportation operations (particularly those involving timber and coal) permit BN to commit internally generated funds to capital intensive projects required by its rail service.

Applicants estimate the following net benefits from the proposed merger, based on the underlying studies:

TABLE 5

Merger benefits (costs) by year following consummation[1]

Study areas	Year		
	One	Two	Three
	Millions		
Traffic (New):			
BN-Frisco	$10.89	$15.92	$16.76
Rail subsidiaries	0.23	0.33	0.10
Subtotal	11.12	16.25	16.86
Operations[2]	7.27	17.09	20.83
Employee protection	(15.96)	(7.84)	(4.64)
Total	2.43	25.50	33.05

[1]1976 dollars.

[2]Includes net benefits from changes in internal (to merged system) routings of traffic and from unchanged joint traffic no longer requiring interchange.

A summary of the economic results of the operating and labor studies (the latter study is discussed later) for the first 3 years after merger is shown in table 6.

TABLE 6

Summary of merger economic benefits operating and labor savings (costs)

Operating	Year		
	One	Two	Three
(a) Common point consolidation	$3,804,264	$3,804,264	$3,804,264
(b) Operating division organization	(40,487)	(40,487)	(40,487)
(c) Informations	(1,612,500)	(1,015,000)	(712,000)
(d) Communications	(1,298,586)	(530,031)	(66,031)
(e) Compatibility of equipment	(879,582)	(534,405)	(519,659)
(f) Standardized locomotive heavy repair policy	(1,240,781)	(503,823)	232,816
(g) Consolidated maintenance facilities and functions	523,922	1,048,730	1,048,730
(h) Unchanged joint traffic:			
Use of shorter routes	630,539	630,539	630,539
Interchange cost savings	480,332	480,332	580,332
TRRA cost savings	26,188	26,188	26,188
(i) Upgrading plans	----------	(370,983)	(185,492)

Summary of merger economic benefits operating and labor savings (costs)—Continued

Operating	Year		
	One	Two	Three
(j) Equipment:			
Acquisition, locomotives and cabooses	(5,609,521)	(5,609,521)	(5,609,521)
Freight car utilization	2,593,504	4,327,504	6,006,104
(k) Purchasing-material	1,135,232	1,135,232	1,135,232
(l) Overhead:			
Nonlabor	2,557,417	4,231,370	4,335,724
Labor	6,759,994	10,417,256	10,659,831
(m) Exempt employee benefits	(560,836)	(408,285)	(397,389)
Total[1]	7,269,099	17,088,088	20,829,181
Employee protection:			
(a) Scheduled	(7,771,180)	(6,776,263)	(4,546,696)
(b) Exempt	(8,187,991)	(1,061,614)	(91,901)
Total[1]	(15,959,171)	(7,837,877)	(4,638,597)

[1]Totals are shown in table 5.

Applicants note that the proposed merger would be entirely end-to-end in nature. In their opinion, an end-to-end merger represents the best approach to extending the systems' strength because it serves to buttress existing traffic volume and activities, while rationalizing the industry's corporate structures. Applicants maintain that through an end-to-end merger, there is no loss of competitors in any geographic market; rather, both intra- and intermodal competition is strengthened. In addition, end-to-end mergers generate little or no abandonment of rail lines because, by their nature, few of the facilities are duplicative and therefore made redundant by the consolidation. Finally, applicants urge that end-to-end mergers do not drain available capital resources in order to unite the two companies, but instead allow merger benefits to be achieved almost immediately after consolidation, with limited, or at most transitory, impacts on employees.

Purchasing and materials

The applicants estimate a total recurring savings of purchasing and material of $1,135,232 (table 6, item (k)) with three components: increased revenue from scrap ($195,232); general purchases ($840,000); and freight car purchases ($100,000). These savings will fluctuate with business volumes.

Information systems

To develop a single standardized information system for the merged carrier, a joint BN-Frisco study team concluded that BN's Complete Operating Movement Processing and Service System (COMPASS) should be expanded to include Frisco data. To accomplish this, applicants estimate $1,175,000 in nonrecurring costs in the first year and recurring costs of $437,500 (first year), $1,015,000 (second year), and $712,000 (third year). (Table 6, item (c).)

The public interest benefits claimed by applicants

On brief, applicants summarize and discuss the several benefits they claim will result from their proposed merger. They maintain that the merger will significantly improve service to shippers in the form of new single-line service, reduced transit times, more efficient and frequent service, and improved car utilization. Applicants point out that the merged company would offer new single-line service in major market areas extending from the Gulf Coast through the Midwest to the Northwest and from the Great Lakes region to the Texas coast. The new company would provide single-line service from principal southeastern cities such as Birmingham, Memphis, and Mobile to cities in the northwest such as Portland, Seattle, and Vancouver; and from Chicago to cities such as Tulsa, Oklahoma City, and Houston; and a more direct route from Chicago to Dallas-Fort Worth, Houston, and Galveston than the circuitous Denver route which BN now operates with its subsidiaries C&S and FW&D.

This new single-line service, according to applicants, would result in significant service improvements for shippers. One of the principal claimed benefits resulting from the single-line service would be reduced transit times. Single-line service would allow preblocked trains to move over long distances without interchange and with minimal switching en route, expecially at the congested common points of Kansas City and St. Louis, thereby saving time and resources. For example, through-train schedules are proposed from Portland and Seattle via Minot and between Chicago and Memphis-Birmingham, Minneapolis and Memphis, Lincoln and Tulsa, Chicago and Tulsa, and Tulsa and Houston. Applicants claim that transit time will be reduced from (1) Chicago to Tulsa by 19 hours or 43 percent, (2) Portland to Memphis by 14 hours or 12 percent, and (3) Minneapolis to Memphis by 46 hours or 49 percent.

Applicants contend that improved service resulting from single-line routes opened up by this merger would also create the potential for shippers to compete in new markets, heretofore not feasible because of inadequate, costly, or inefficient service. For example, opening a single-line route from the northwest to the expanding markets in the southeast would significantly facilitate development of important western coal in the Powder River Basin of Montana and Wyoming. In view of the energy crises, applicants urge that the development of this market as an alternative to petroleum and natural gas is urgent.

Applicants also state that faster transit times and reduced intermediate switching would decrease the amount of handling of shipments, reducing the incidence of loss and damage. Moreover, reduced transit time would increase freight car and locomotive utilization, and thus increase car availability to the shipping public.

More efficient utilization of the combined freight car fleets will help alleviate car shortages, applicants claim. They plan to use a computerized information system for centralized car location and distribution which will expeditiously inform shippers of the location and delivery dates of shipments. This system would also permit a more efficient match-up of the supply of available empty freight cars with shipper demand.

In applicants' opinion car utilization would also be improved dramatically because car service rules which currently impede the movement of empty freight cars between the two companies would not apply. It is anticipated that over 5 million BN-Frisco empty car-miles will be eliminated each year.

In addition to faster and more reliable service to shippers, applicants claim that their operating plan provides for more frequent service for shippers in major traffic corridors. Approximately 12 new trains per day will be operated, and only 4 presently scheduled trains will be eliminated.

Applicants state that the proposed merger would afford greater rerouting capabilities, improving service by avoiding delays or interruptions and using shorter line-haul movements over the consolidated system. Currently, traffic tends to move via the longest haul within each respective system in order to attain the maximum revenue division.

The proposed merger in applicants' judgment would result in a financially strong new company able to attract necessary capital. They anticipate that the net financial benefits to the merged system after the third year of consolidation would be approximately $33

million. These financial benefits would stem primarily from two sources—the attraction of new traffic through improved service and consolidation savings resulting from the end-to-end character of the merger.

The new traffic is expected from two sources: traffic now carried on the BN, Frisco, or their subsidiaries which will be carried on a longer haul in the merged system; and traffic presently carried by other modes which would be attracted to the merged system due to superior service. After the third year of merger it is expected that the gross freight revenue gains from the first source would be $66,101,900, the associated costs would be $49,245,586 and the net traffic revenue gains would be $16,856,314.

Applicants' estimate of the net savings that would result from the unification of operating functions, including elimination of independent operations at the common points of Kansas City and St. Louis, after the third year of operations, would be $20,829,181.

Applicants believe that their management policies are compatible, with consistent objectives and performance.

Applicants argue that the merger represents an opportunity for Frisco to reduce its dependence on overhead traffic by incorporating it into a viable and strengthened BN system. In 1976, 31.5 percent of Frisco's 796,108 freight carloads were interline forwarded, 28.4 percent were interline received, 23.6 percent were intermediate or overhead, and only 16.5 percent were local. Frisco belives this consolidation is necessary for it to continue to provide quality transportation services in the future. Applicants also state that Frisco's financial base would be expanded, because BN's internally generated funds from nontransportation activities would be available to the merged system. Further, Frisco's present marketing strategies for the economically expanding Sunbelt would be extended throughout BN's territory.

Applicants argue that the benefits of the merger would create a strong new competitor, and that this strength will force competing carriers to improve service to meet the service and rates offered by the merged company. Applicants contend that the protective conditions sought by protestants to shelter themselves from the increased competition are anticompetitive.

In applicants' view, the merged company's improved ability to compete intermodally is equally important. Applicants note that in the past 30 years, the railroad industry has lost 50 percent of its market to other transportation modes, even though railroads are among the most energy efficient. (They consume the least amount of

energy per gross ton-mile of traffic hauled by any form of ground transportation). Applicants believe that the superior service which the merged company will offer shippers, together with competitive ratemaking and improved car supply, should attract business which has been diverted to trucks and barges, particularly on grain traffic from the Midwest. Further, new single-line service between the Northwest and the Sunbelt should also attract a substantial portion of the business which has been lost to motor carriers as a result of poor rail service.

Applicants believe that the merged company's improved intermodal competitive strength will also result in increased traffic for connecting rail carriers. In turn, this would partially offset the diversionary impact resulting from the merger. Applicants state that it is impossible to quantify the amount of business potentially attracted from other modes, but they believe the amount would be significant.

Applicants contend that the concurrence of rivalry and interdependence ("Balkanization") among rail carriers has created numerous long-run problems. Effective competition is hindered if other rail competitors are able to retaliate on interline shipments in their capacity as connecting carriers. Interchanging traffic alone adds to the total costs of handling traffic, including operational costs (car switching) and clerical costs (recordkeeping). Interchanging freight impairs service by significantly adding to delivery transit time.

Even more important, in applicants' estimation, are the intangible factors of loss of control and sense of responsibility for the shipment by the originating carriers when the freight is transferred to intermediate or destination carriers. Applicants maintain that this minimizes the incentive to make service improvements on interline traffic or to solicit interline traffic on the basis of superior service.

In addition to discouraging marketing and service initiatives on interline shipments, applicants argue that "Balkanization" discourages innovative ratesetting. The tendency has been to continue longstanding practices rather than initiate imaginative or aggressive pricing, because the reactions of competing and connecting carriers are too unpredictable and their powers of retaliation too strong. The reluctance to change pricing more flexibly in response to changing competitive factors is also responsible, according to applicants, for the continuing shift of traffic to other modes.

Applicants argue that end-to-end mergers effectively eliminate the problems described above, and thus their transaction is consistent with Federal goals of rail rationalization. They cite the Commission's Rail Services Planning Office in its final report in the "Rail Merger Study," issued February !, 1978, and the November 1973 report of the Task Force on Railroad Productivity made to the National Commission on Productivity and the Council of Economic Advisors. Further, applicants state that since the proposed merger is end-to-end, no abandonments of lines or of service would be made, and no competitors would be eliminated (as in a "parallel" merger).

Applicants point out that while fixed charges would increase by $6.04 million in the first year of merged operations, the increase is minimal compared to the financial benefits to be realized. Applicants contend that the merged company's increased business would in turn create new job opportunities. Although consolidation of facilities at Kansas City and St. Louis would result in relocation of forces, applicants state that in most cases any employees adversely affected would be promptly reabsorbed by the merged company into new vacancies created increased traffic and by normal attrition. They also contend that the security of existing jobs would be enhanced by the increased strength of a merged BN-Frisco.

Stock exchange

Morgan Stanley assisted BN in structuring and negotiating a security package to accomplish the merger. The package was designed to:

Maintain the dividend level of Frisco shares;

Provide an equity interest to Frisco shareholders consistent with its past and expected earnings contributions;

Result in no material dilution in expected earnings of BN shares; and

Avoid any material adverse effects on BN's capitalization and fixed charged coverage.

After a detailed review of both BN and Frisco which included financial statements, operations, characteristics, and performance, Morgan Stanley recommended a number of combinations of security packages to fit the criteria. It recommended that BN offer a security package of a new BN straight preferred and BN common stock. This combination was preferred because it best met the objectives of (1) maintaining the Frisco dividend, and (2) providing a stock

component consistent with both the past and future expected earnings contribution of Frisco. A price range of $50 to $55 was recommended for each share of Frisco stock.

Salomon Brothers assisted Frisco in its merger discussions with BN. Financial and operational data of both railroads were reviewed and analyzed. It was determined that the appropriate combination should be a nontaxable merger to Frisco shareholders and they should not receive any diminution in current dividend income. Since Frisco stockholders could not expect to receive dividend parity based upon current dividend levels from an acceptable exchange ratio of common stock, it was determined that some combination of common and preferred stock should form the security package.

Salomon Brothers believed that Frisco stockholders should be offered a premium in market price, not only in current terms, but one which appeared to be sustainable over a reasonable period of time.

Salomon Brothers' approach viewed BN and Frisco as transportation entities with other interests of which Frisco's was small and BN's was substantial. The merger benefits were shared equally and were considered in the negotiation. Prior to the final discussions with BN, Salomon Brothers recommended that Frisco could reasonably agree to a package valued in the range of $52 to $56.

After extensive negotiations between BN and Frisco, the parties agreed to merge based upon a securities package consisting of 0.95 share of BN common and 1/2 share of a new BN $2.125 no par value preferred with $25 redemption value for each outstanding Frisco common share.

The total value of the security package, based upon average prices from February 1 through August 31, 1977, and on prices current as of the negotiation, is as follows:

	Average February to August 1977	September 20, 1977
Price of BN common	$47.63	$41.375
Price of Frisco common	43.23	42.50
Value of $12.50 of new BN	12.125	12.125
Value of 0.95 of BN common	45.249	39.306
Value of package	57.374	51.431
Premium—percent	36.7	21.0

Therefore, the dividend for each share of Frisco would meet the critical element of dividend maintenance at $2.5825 per share (representing 0.95 of the $1.60[17] per share dividend on the BN common stock, plus 0.5 of the dividend per preferred share of $2.125), a slight premium in the Frisco's current dividend. Frisco shareholders would hold 16.8 percent of the total equity in the combined enterprise.

Morgan Stanley believes the merger terms are fair and reasonable to BN stockholders. Salomon Brothers believes that the offer is in the interest of Frisco shareholders.

Consideration was given to the spinning-off of Frisco's interest in New Mex to Frisco stockholders or placing a separate valuation on the interests in the merger negotiations. However, a spinoff would have been taxable to Frisco stockholders. It could have complicated merger discussions and, if the merger was not consummated, Frisco would be left without its interest. A separate valuation of nontransportation holding would not have benefitted Frisco stockholders, since BN has much larger nontransportation assets; any valuation placed on New Mex would have been overshadowed by the valuation of BN's nontransportation assets. After discussions with New Mex management, Morgan Stanley recommended that BN acquire New Mex in the merger. Salomon Brothers agreed.

Employee impacts

Applicants believe that because of increased traffic volumes, a slight increase in employment over 1976 levels can be expected as a result of the merger. Nonetheless, there will be some realignment of work forces. Reductions in force are expected in some work areas as a consequence of the consolidation of headquarters functions and activities at St. Louis and Kansas City. With few exceptions, surplused employees will be absorbed almost immediately by new positions and vacancies caused by the demand of the increased traffic, and by the normal process of attrition. Further, a large percentage of the redundant employees are not represented by labor organizations, and can be expected to transfer where needed and to accept a variety of work assignments. Thus, applicants contend that any adverse impact on employees will be short term only and confined to a relatively few locations. Because of labor protective conditions which are required by statute, no employee would face involuntary unemployment as a direct result of the merger without ample financial protection.

[17] BN's most recent dividend was $2.10 per share.

Traffic volume studies.—Employment impacts resulting from changed traffic volumes were examined by applicants. The work force was adjusted for each line segment and location which would experience increased or decreased car and train volume.

These adjustments would occur in the maintenance of way (track, bridge and building), transportation (train, engine and yard crews, and clerks) and mechanical (machinists, electricians, boilermakers, sheetmetal workers, carmen and laborers) functions. The applicants' study projected the following net changes in the number of these positions:

Department	Net change in number of positions[1]		
	Year		
	One	Two	Total
Maintenance of way	----	243	243
Transportation	287	(39)	248
Mechanical (locomotive)	92	23	115
Mechanical (car)	129	67	196
Material	2	1	3
	510	295	805

[1] ( )Decrease.

Common point consolidation studies.—The applicants also performed studies on those geographic locations where both railroads conduct operations (common points). While the studies considered the common points between the Frisco, QAP, and FW&D at Fort Worth, Irving, Dallas, and Quanah, major improvements through consolidation were evident only at St. Louis and Kansas City. Special studies were conducted to determine the potential for combining facilities and/or forces for improved or more efficient performance at the latter two terminals.

General guidelines used in these studies were that: (1) no changes would be considered that could be accomplished without the merger of the two companies; (2) functions of a similar nature would be concentrated at fewer work centers; (3) quality of present service performance could not be reduced as a result of the consolidation; and (4) the means properly to monitor performances would be implemented.

Applicants' estimated reductions in work forces are listed below:

	Reductions	
	St. Louis	Kansas City
Transportation:		
Officers and exempts	2	5
Clerical	19	17
Yardmasters	3	5
Yard engineers	7	4
Yard conductors	7	4
Yard helpers	14	8
Subtotal	52	43
Mechanical:		
Supervision	3	2
Clerical	1	-----
Car inspectors	6	-----
Machinists	4	-----
Laborer	1	-----
Carmen	14	10
Carmen apprentice	3	-----
Subtotal	32	12
Maintenance of way:		
Officers and exempts	-----	1
Total	84	56

Reflected in the work force reductions is a reduction in switch engine shifts of seven per day at St. Louis and four daily at Kansas City. There will also be a reduction of one switch engine locomotive unit assigned at each location.

The overall savings that will accrue at those two points are:

Item	Savings per year	
	St. Louis	Kansas City
Wage and fringe benefits	$2,100,943	$1,426,250
Expenses other than labor	6,000	6,000
Switch engine operation and maintenance cost	149,621	85,496
Switch engine ownership costs	14,976	14,976
Total	2,271,540	1,532,724

For the St. Louis and Kansas City terminals combined, common point consolidation savings totaled $3,804,264 per year (table 6, 360 I.C.C.

item (a)), of which $3,527,193 are savings in wages and fringe benefits.

Comparison of studies—labor and operational.—Applicants used different costing methods for their labor and operating studies. The differences are *de minimus*, but are reflected in the subsequent discussion.

Overhead study.—The overhead study determined savings from combining the existing BN-Frisco forces engaged in systemwide functions, which include all supervisory and staff positions above the operation division level. It is essentially a plan for the unification of the headquarters and the general staff functions of the two companies.

Included in the studies were 3,166 BN and 1,335 Frisco jobs, of which 2,763 were exempt (nonunion) and 1,738 were scheduled (union). Of the total jobs studied, it has been estimated that there will be a net reduction of 428 jobs (264 exempt and 164 scheduled), and the relocation of another 126 exempt and 76 scheduled jobs. The resulting labor savings, including payroll additives, will amount to $10,704,915 annually (see table 7 below).

TABLE 7

Overhead study labor savings

	Net jobs abolished (1)	Wages saved (2)	Payroll additives[1] (3)	Labor saving (4) = (2) + (3)
Exempt	264	56,008,898	$1,798,463	7,807,361
Scheduled jobs	164	2,367,863	529,691	2,897,554
Total	428	8,376,761	2,328,154	10,704,915

[1]Payroll additives were calculated as a percentage of the wages saved in the overhead study. The percentage applied to exempt wages was 29.93 percent and to the scheduled wages 22.37 percent.

Table 8 presents the cumulative summary of savings by year.

TABLE 8

Cumulative summary of realized savings overhead study

Savings	Year		
	One	Two	Three
Labor[1]	$6,759,994	$10,417,256	$10,659,831
Other than labor[1]	2,557,417	4,231,370	4,335,724
Total	9,317,411	14,231,628	14,995,555

[1]These amounts are also shown in table 6, item 1.

During the fourth and fifth years of the merged operation, another $135,084 will be realized, according to applicants, raising total savings in overhead to $15,130,639.

Savings other than labor have been estimated at $4,425,724. Approximately three-quarters of these savings represent savings in insurance premiums ($1,864,810), data processing equipment rent and maintenance ($794,775), and expense accounts ($626,698).

Labor—scheduled.—No protective or implementing agreements have been entered into with employee organizations.

Applicants conducted studies of the impact of the merger on union employees and their wage and employment protection costs. They assumed that work transfers and consolidation of facilities would be timed, where reasonably possible, to maximize utilization of available manpower and to avoid a loss of skilled employees. Positions were counted as abolished whenever work equivalent to a 5-day per week, full-time position was eliminated at a particular location, even though it could be possible to reassign the employees involved to other work without a formal abolishment and rebulletin of positions, or a new position at the same location. Rates for 1976 wages, payroll taxes, insurance premiums and other benefits were used in performing the studies.

Applicants conclude that 704 new scheduled positions would be created and 452 positions abolished in the first year following the merger. Reductions in force will occur principally at Springfield, St. Louis, and Kansas City, where a net 144, 127, and 41 jobs would be abolished. Total changes in position and wage costs are shown in table 9.

TABLE 9

Scheduled employees: changes in position and wages

Item	Year		
	One	Two	Three
Positions added (excluding transfers)	704	355	0
Positions abolished (excluding transfers)	452	86	27
Net positions added (saved)	252	269	(27)
Positions transferred	100	0	5
New wages, insurance and taxes added ---millions---	$6.0	$10.6	$10.1

Among the crafts affected, trainmen, carmen, and machinists show the greatest gains in positions, with net increases of 168, 80, and 68 positions, respectively, in the first. Maintenance-of-way positions also showed increases, but not until the second year, when a net 243 positions would be added. Among the crafts losing net positions, clerks are hardest hit, losing a net 157 positions in the first year. Net changes within other crafts during the first year include: enginemen (+55 positions); electricians (+27); sheetmetal workers (+17); boilermakers (+11); dispatchers (+1); yardmasters (-11); and laborers (-7).

Applicants also determined the number of employees becoming surplus. In each of the three years following the merger, applicants estimate that surplus employees will number no more than 358, 285, and 186, respectively. While applicants expect most of these employees to be absorbed into new positions or other vacancies or to receive opportunities for retraining for other crafts, those employees who are surplussed, displaced, or transferred due to the transaction will be covered by protective conditions.

In estimating the cost of protective benefits, applicants assumed that the Commission would impose only the protective conditions required by statute.[16] Applicants further assumed that: (1) job abolishments, transfers, or creations would occur on the first day of the year; (2) abolished jobs would be coordinated with created jobs of a similar nature to the extent possible; (3) no separations would occur, but that in each craft at each location, costs for surplus employees would be at least as much as if all surplus employees took separation pay when eligible; and (4) attrition would occur at an even rate throughout the year. In assuming an even rate of attrition,

[16] 49 U.S.C. 11347.

applicants charged an average 6-month wage expense for each surplus employee absorbed through attrition per year and 12-month wages for remaining surplus employees.

Other assumptions used in determining the cost of protection included:

(1) For each net job eliminated, in each craft at each location, 1.5 employees, in addition to those made surplus, would be displaced to lower-rated positions for an average of 36 months, which would require a displacement allowance payment of 5 percent of the average annual wage, unless a larger allowance was indicated by the circumstances.

(2) At common points, seniority districts would be consolidated so that a displaced employee would have the opportunity to exercise seniority in this existing seniority district and at least all other jobs in the craft in the surrounding terminal area. Multiple seniority districts, which exist for clerks and certain shop crafts at Springfield, would be consolidated into a single overall craft district.

(3) The attrition rate for union employees would be 7.5 percent per year at all locations, and the amount that could be utilized to absorb surplus employees would be 90 percent for clerical employees and 100 percent in other classifications.[10]

(4) Ten percent of the union employees asked to transfer their residence out of their existing seniority district would do so, at an average cost of $10,000 for moving allowances, relocation expenses, moving time, and real estate protection.

Based on their studies, applicants conclude that costs for employees' protective benefits will total $7.8 million in the first year following the merger, $6.8 million in year two and $4.5 million in year three. (Table 6, Employee Protection, item (a).) Total costs to the applicants resulting from impacts on union employees (i.e., net wages added as a result of increased union positions and protective conditions for union employees becoming surplus or who are displaced or transferred) amount to $13.7 million, $17.3 million and $14.6 million, in each of the three years following the merger.

Labor—exempt.—The impacts on nonunion employees (exempt) and their attendant wage and protective benefit costs to the applicants were developed by determining (1) the cost of job protection and moving expenses for displaced or transferred employees and (2) the costs of providing a unified program of employee benefits for exempt employees.

Applicants' estimated changes in positions and attendant savings for the first 3 years following merger are shown in table 10.

[10]The applicants did not use the attrition information contained in the application. They claim that this information was not useful because the rates are influenced by high turnover of newly employed persons, a group which creates no vacancies for surplus employees in a merger situation.

TABLE 10

Impacts on exempt employees

Item	Year		
	One	Two	Three
Jobs abolished	449	11	3
Jobs added	212	5	0
Jobs transferred	126	0	1
Net surplus employees	237	6	3
Net wages and fringe benefits saved—millions	$7.1	$7.3	$7.4

In determining the cost of placing employees into vacant positions, an attrition rate of 6.2 percent was used to determine vacancies. This rate was based on past actual attrition of BN exempt employees. Exempt employees were considered a single class for attrition purposes and it was assumed that job abolishments and additions would occur on the first day of the period. Applicants further assumed that the matching of skills and qualifications would allow the use of 50 percent of the available vacancies to absorb unassigned exempt employees. It was also assumed that 5 percent of their employees required to transfer would not do so and resign.

In calculating its costs, applicants charged a 6-month wage expense based on the average salary of unassigned exempt employees for each employee absorbed during the year. A 12-month salary expense for the remaining unassigned employees was used. By applying the average salary of unassigned exempt employees and the average benefit costs of the two applicants, a fringe benefit of 29.93 percent was developed. Total transfer costs, including costs for employees whose positions are transferred or who transfer to fill a newly created position, were based on actual BN merger transfer cost experience, elevated to 1976 price levels. Applicants conclude that employee protection costs will total $8.2 million in the first year following merger, $1.1 million in the second year and $91.9 thousand in the third year. (Table 6, Employee protection, item (b).)

The study for providing unified benefits was based on the premise that no employee would be placed in a worse position as a result of the merger, and with the object of equalizing benefits for employees of BN and Frisco. Each railroad's benefit programs were studied. Cost efficient changes in current administrative procedures and data commonly used in establishing the rating structure (i.e., age, service,

payroll volume and the current number of employees with applicable dependent ratios) were considered. Initial cost statistics, based on the actual 1976 cost, and then new costs, were established by combining all exempt employees under the new program. Pension costs were determined, based on a preliminary actuarial study, by adding Frisco employee data into BN's pension plan. Consideration was given to the unfunded total and vested liabilities of BN's plan.

Applicants' estimate of the cost of providing a unified benefit program (table 6, item (m)) is detailed in table 11.

TABLE 11

BN-Frisco exempt employee benefit costs

Benefit	Premerger plan combined cost	Year One	Year Two	Year Three
Pension plan	$12,104,000	$12,696,825	$12,605,475	$12,598,950
Medical plan	4,331,900	4,202,280	4,172,040	4,169,880
Life insurance	1,728,600	1,946,767	1,932,781	1,931,782
Accidental death and dismemberment	8,050	48,964	48,611	48,586
Short-term disability	797,900	653,288	648,584	648,248
Long-term disability	729,000	757,120	751,660	751,270
Dental plan	904,500	853,654	847,522	847,084
Travel accident	39,500	45,388	45,062	45,039
Total annual cost	20,643,450	21,204,286	21,051,735	21,040,839
Increased cost[1]	------	560,836	408,285	397,389

[1]Table 6, item (m).

Note: Reductions in costs for particular benefits are the result of jobs being abolished during the 3-year period.

Total net costs resulting from impacts on nonunion employees (i.e., wages saved, protection costs and increased costs for providing a unified benefit program) amount to $1.6 million in the first year, followed by saving of $5.9 million and $6.9 million, respectively, in each of the next two years following merger.

National defense

The applicants believe that no defense-related service presently provided by either BN or Frisco will be hindered by the proposed merger, but in fact, will be improved to the same degree as for shipments by the public.

Shipper support

A dozen shippers testified in support of the merger. Combined they paid over $1 billion for rail transportation services in 1977. Their testimony is detailed in appendix C.

The reasons for their support vary; however, the overriding factor is their belief that the merged company could provide better service. This service ranges from faster transit times to easier tracing of shipments. The combined car fleet, and particularly the ability to have BN equipment available in the South and Southeast and Frisco equipment available in the Northwest and North Central regions, are considered particularly important.

FINANCIAL ANALYSIS

Burlington Northern

BN has reported net incomes in each year since the Northern Lines merger, with the exception of 1971 due to an extraordinary item of $67.5 million. While net railway operating income has been substantial, other income has been greater than $50 million annually since 1973. The carrier has reported positive working capital each year since 1968, with a working capital ratio ranging from a high of 1.68 to a low of 1.15. In 1976, the base year, BN earned a net income of $72.6 million on railway operating revenues of $1.5 billion. The rate of return averaged 2.24 percent for the period 1968-78, with a return of 2.40 percent for 1976. The carrier's debt-to-equity ratio has averaged in the low thirties for the period 1968-77. Fixed charges have been covered rather well, with an average coverage of slightly over 2.0 times for the 11-year period and a good 2.3 times for 1976.

St. Louis-San Francisco Railway Company

Frisco has been profitable in each year since 1968, and reported a net income of $12.0 million for 1976. The carrier had positive working capital in each year from 1968-77, with an average working capital ratio for the 10 years of 1.22. Frisco's rate of return averaged 4.86 percent for the 11-year study period. In 1976 the carrier reported a return of 4.51 percent. The debt-to-equity ratio has been acceptable, ranging from a low of 43.9 percent to a high of 49.6 percent. The average fixed charges coverage for the period 1968-78 was a good 2.33 times. A 2.1 coverage was reported for the base year, 1976.

Financial benefits to merged company

The applicants' *pro forma* income statement indicates that the third year after the merger, the merged company expects a net increase in railway operating revenues of $65.328 million, for combined railway operating revenues of $1,918.2 million. This projection was made using a base year of 1976, thus taking no economic considerations into account. The applicants anticipate that railway operating expenses would increase by a net amount of $27.113 million, for combined railway operating expenses of $1,524.5 million. The estimated profit is $112.9 million, of which $28.4 million is attributable to the merger.

Impact on the exchange offer on income statement.—Because the purchase price is less than the net book value, the depreciable assets of the Frisco will be written down to purchase cost, hence reducing the depreciation base. In so doing, the depreciation expense to be recorded in the income statement will have a lesser impact on earnings, thus adding to net income. As an offset, the long-term debt will be written down to its present value. Since long-term debt is retired at par value, the difference between book value and the restated value will be amortized over the life of the debt. This will result in an increase in fixed charges that will more than offset the decrease in depreciation expenses. The additional fixed charges required ($6.6 million) exceeds the $4.7 million decrease in depreciation expense, so that the overall effect on the income statement is to reduce net taxable income by $1.9 million in the first *pro forma* year.

This decrease in taxable income should not be looked upon as detrimental, since it does not require any cash outlay and reduces the cash outlay required to pay Federal income taxes.

The table below presents fixed charge coverage for the base year and each of the first three years after the merger.

TABLE 12

Fixed charge coverage

	BN 1976	Frisco 1976	Merged company		
			Year		
			One	Two	Three
			Thousands		
Income available for fixed charges	$131,829	$25,367	$168,389	$185,904	$190,311
Fixed charges	59,241	12,049	77,328	76,462	76,024
Coverage (times)	2.23	2.11	2.18	2.43	2.50

The net increase in fixed charges resulting from the proposed merger is estimated to be $6.04 million in the first year of merged operation. This increase is the result of two factors. The first is the discounting of the principal amount of debt and capitalized lease obligations to reflect current interest rates. The increase so computed does not result in any increase in the cash payments for existing fixed charges because this is purely a purchase accounting change in interest rates. Second, to accommodate the projected increase in traffic volume, it is estimated that the merged company will acquire 17 new cabooses. The resulting increase in fixed charges will be offset, at least in part, by the avoidance of certain locomotive and freight car purchases. In the case of the BN-Frisco merger, the most important impacts are a reduction in depreciation due to a writedown of the historical cost of depreciable property to allocated purchase cost and an offsetting increase in accounting fixed charges due to the writedown of long-term debt to present values. Since such long-term debt must be retired at fixed or par value, additional fixed charges are required to amortize the discount created by the purchase accounting adjustment. The operating expenses, equipment rents and fixed charges in the *pro forma* income statement reflect adjustments for the adoption by Frisco of accounting for leases as provided by Financial Accounting Standards Board Statement (FASB) No. 13. This accounting already is reflected in BN statements.

Improved revenues, additional costs, and savings are expressed in additional cash receipts and reduced cash expenditures. In

preparing the *pro forma* financial statements, however, it was necessary to give different treatment to certain of those amounts which are in the nature of additions and betterments rather than expenses, as well as the effect of purchase accounting. Thus, *pro forma* operating expenses must reflect the reduction in depreciation expense resulting from purchase accounting as well as the additional costs of handling increased traffic and the merger savings. Other portions of the *pro forma* income statement reflect additional fixed charges, again resulting from purchase accounting. The increase in *pro forma* net income is on an after-tax basis.

The following table indicates cash flow for each applicant for 1976, the base year, and the merged company for the first 3 years after the proposed merger. This table demonstrates the ability to repay debt and make necessary capital investments.

TABLE 13

Cash flow and debt coverage

	BN 1976	Frisco 1976	Merged company		
			Year		
			One	Two	Three
			Thousands		
Ordinary income	$72.588	$11.956	$89.699	$108.080	$112.925
Depreciation and retirement	66.874	14.450	76.371	76.091	75.812
Deferred income taxes	2.847	1.635	4.482	4.482	4.482
Undistributed earnings	(7.621)	(143)	(7.990)	(8.096)	(8.113)
Total	134.688	27.898	162.562	183.557	185.106
Long-term debt due within 1 year	50.911	13.935	66.438	66.438	66.438
Coverage (times)	2.65	2.00	2.45	2.76	2.79

Each carrier had adequate cash flow to cover its long-term debt due within 1 year for the base year. The coverage of debt maturity after merger should allow an adequate contribution toward future capital investments.

Impact of the exchange offer on balance sheet.—The consideration given by BN is the fair value of the common and preferred shares which it proposes to issue plus the fair value of the liabilities

to be assumed. The fair value of the liabilities assumed is the discounted value of debt at current interest rates and the present value of certain other liabilities, such as that for unfunded pensions.

The fair value of the consideration given must be apportioned to the assets acquired. Briefly, current assets are reported at book value and the remaining fair value of consideration given is apportioned to other assets, including investments and road and equipment property, in proportion to the fair values of assets.

The *pro forma* balance sheet illustrates this technique. Using the valuation figures estimated by Salomon Brothers, the book value was reduced by $88.6 million.

The *pro forma* balance sheet reflects the purchase accounting adjustments as well as the *pro forma* adoption by Frisco of accounting for leases as provided by FASB No. 13.

The working capital position of the applicants and the merged company is presented below.

TABLE 14

Working capital

	BN 1976	Frisco 1976	Merged company
		Thousands	
Current assets	$388,482	$59,946	$448,428
Current liabilities[1]	357,934	68,959	423,519
Working capital	30,548	(9,013)	24,909
Working capital ratio	1.09	0.87	1.06

[1]Includes long-term debt due within 1 year.

It is expected that the anticipated growth in cash flow and earning power of the merged company would lead to a stronger working capital position that either road could attain alone.

The *pro forma* balance sheet indicates that the merged company will have a debt-to-debt plus equity ratio of 38.0. This ratio is slightly higher than BN's ratio of 35.6 for 1976 and below Frisco's 48.4 for 1976. A ratio of 38.0 should not have an adverse impact on the merged company's future financing.

Normally a carrier will have capitalizable assets in excess of total capitalization, as in the case of the merged company as shown below.

TABLE 15

Capitalizable assets of merged company

Working capital	$91,347,000
Carrier operating property less depreciation	2,739,251,000
Investment in transportation subsidiaries plus undistributed earnings	363,453,000
Total capitalizable assets	3,194,051,000
Total capitalization[1]	3,094,218,000
Capitalization assets in excess of capitalization	99,833,000

[1]See schedule of capitalization of merged company below.

Since the merged company will have capitalizable assets in excess of capitalization, the attendant pressures of overcapitalization should not be felt and further expansion of capitalization is possible.

TABLE 16

Capitalization of Burlington Northern, Inc. after merger, December 31, 1976

	BN	Frisco	Adjustments	Pro forma
		Thousands		
Short-term borrowings—notes payable (1)	$17,343	----------	----------	$17,343
Current portion of long-term debt and capitalized lease obligations (2)	55,877	$13,935	$(3,374)	66,438
Long-term debt and capitalized lease obligations:				
Mortgage and collateral trust bonds (3)	471,597	105,608	(40,018)	537,187
Equipment and other obligations (4)	323,249	104,101	6,471	433,821
Capitalized lease obligations (5)	36,305	----------	12,287	48,592
Due to affiliated cost	59,712	275	----------	59,987
Convertible debentures (6)	65,000	----------	----------	65,000
Total	955,863	209,984	----------	1,144,587
Stockholders' equity (7) and (14):				
Preferred stock:				
$10 par value; authorized, 2,978,875 shares; outstanding, 2,899,326 shares	28,993	----------	----------	28,993
No par value; authorized, 5 million shares (8); outstanding:				
Series A, 344,850 shares $2.125, $25 redemption value (10)	10,346	----------	----------	10,346
	----------	----------	32,642	32,642

Capitalization of Burlington Northern, Inc. after merger, December 31, 1976—Continued

	BN	Frisco	Adjustments	Pro forma
		Thousands		
Preferred stock—Continued:				
$100 par value; authorized 1,500,000 shares; issued, none (11)	----	----	----	----
$10,000 par value, redeemable preference shares; authorized 3,000; shares issued, none (9)	----	----	----	----
Common stock, without par value authorized, 25 million shares; outstanding, 12,457,876 shares (12)	$544,329	----	$104,370	$648,699
Common stock, without par value; authorized, 6 million shares; issued 2,611,436 shares; outstanding, 2,611,386 shares (13)	----	113,967	(113,967)	----
Capital surplus (13)	----	19,019	(19,019)	----
Retained earnings (13)	1,145,170	90,554	(90,554)	1,145,170
Total	1,728,838	223,540	----	1,865,850
Total capitalization	2,757,921	447,459	----	3,094,218

Explanatory notes

(1) BN short-term borrowings (historical) consisted of $16,388 of notes payable and $1,000 commercial paper. The average interest rates at December 31, 1976 were 4.76 percent and 4.75 percent for notes payable and commercial paper, respectively.

(2) Frisco's historical current portion of long-term debt and capitalized lease obligations have been adjusted to reflect the fair value of long-term debt maturities and capitalized lease obligations in arriving at the *pro forma* amount.

(3) Interest rates on BN obligations range from 2.625 percent to 8.60 percent and are due from 1978 to 2047. Interest rates on Frisco's obligations have been adjusted to reflect, on a *pro forma* basis, fair value at December 31, 1976, resulting in a *pro forma* reduction of $40,018,000 in principal amount; accordingly, such amounts included in the *pro forma* column have interest rates ranging from 8.25 percent to 13.16 percent and are due 1978 to 2006.

(4) BN's equipment and other obligations bear interest ranging from 3 7/8 percent to 9 3/4 percent and are due 1978 to 1993. Interest rates on SLSF's obligations have been adjusted to reflect, on a *pro forma* basis, fair value at December 31, 1976, resulting in a *pro forma* increase of $6,471,000; accordingly, such amounts included in the *pro forma* column have an interest rate of 8.25 percent and are due 1978 to 1992.

(5) BN's long-term capitalized lease obligations are due 1978 to 1991. Frisco's capitalized lease obligations (long-term portion of $12,287,000 at December 31, 1976) have been included in the *pro forma* column in order to reflect the adoption of FASB No. 13. Such lease obligations are due 1978 to 1993.

(6) BN's covertible debentures bear interest at 5 1/4 percent and are due 1992. The convertible debentures may be converted into common stock at $55 per share, subject to antidilution provisions, at any time on or before January 15, 1992. The debentures are redeemable at the option of BN at 103.7 percent of principal amount in 1977, at declining percentages through 1988.

Explanatory notes—Continued

and at par thereafter. Beginning in 1983 and continuing through 1991, BN is required to retire annually $5 million principal amount of debentures, subject to adjustment for debentures previously converted, acquired, or redeemed. In addition, during such period BN has the noncumulative option annually to provide cash for the retirement at 100 percent of the principal amount, of up to an additional $5 million of outstanding debentures. BN has reserved 1,181,818 shares of its authorized but unissued common stock for issuance upon conversion of the debentures.

(7) On May 12, 1977, BN stockholders approved an amendment to the restated certificate of incorporation creating a new class of redeemable preference shares consisting of 10,000 shares having a par value of $10,000 each. On the same date, the stockholders approved the 1977 stock option incentive plan, authorizing the granting of nonqualified options to purchase up to 600,000 shares of BN common stock officers and key salaried employees of BN and its subsidiaries. Pursuant to such authorization, the board of directors on May 12, 1977 granted options to 451 persons, covering 125,850 shares of common stock at a price of $48.50 per share.

(8) On July 7, 1977, BN issued 2 million shares of $2.85 convertible preferred stock at a price of $50 per share and accrued dividends for $96,932,000 net of issuance costs. The shares are convertible at any time into common stock of BN, unless previously redeemed, at a conversion rate of 0.8889 shares of common stock for each share of preferred stock subject to adjustments in certain events. BN may, at its option, redeem such preferred stock, in whole or in part, upon at least 30 days' notice at $52.85 per share prior to July 1, 1979, at decreasing prices thereafter prior to July 1, 1987, and thereafter at $50 per share.

(9) On May 11, 1976, Frisco stockholders approved an amendment to the articles of association creating a new class of redeemable preference shares consisting of 3,000 shares having a par value of $10,000 each.

(10) For *pro forma* purposes it is assumed that 1,305,693 shares of BN $2.125 no par value preferred stock, $25 redemption value, were issued December 31, 1976, at par at an exchange ratio of one-half share of preferred stock for each outstanding share of Frisco common stock. The *pro forma* share amount assumes no cash payments for fractional shares. Such payments are provided for in the merger agreement. The ultimate issuance of such stock is subject to approvals of the merger by BN and Frisco shareholders and the ICC. For *** the ICC. (In a letter to the Commission dated October 29, 1979, attorneys for the applicants stated that 1,347,785 shares of the new preferred stock would be issued or reserved for issuance).

(11) None of the Frisco $100 par value preferred stock ($1,500,000 shares authorized) has been issued.

(12) For *pro forma* purposes, it is assumed that an additional 2,480,817 shares of BN's common stock were issued December 31, 1976, at an exchange ratio of 0.95 BN share for each outstanding share of Frisco common stock. The *pro forma* share amount assumes no cash payments or fractional shares. Such payments are provided for in the merger agreement and are reflected in the adjustments and *pro forma* columns at a price of $41.25 per share, the closing market price of BN common stock on the date the respective boards of directors agreed in principle to the terms of the proposed merger. In addition, $2,036,000, which represents the assumed conversion of all outstanding Frisco stock options at the merger conversion rate less the grant price ($23.44) of such options, has been added to the common stock. For *** common stock, (In a letter to the Commission dated October 29, 1979, attorneys for the applicant stated that 2,560,791 shares of BN common stock are anticipated to be issued or reserved for issuance).

(13) The proposed transaction will be accounted for as a purchase and, accordingly, the Frisco common stock will be retired and Frisco capital surplus and retained earnings of prior to the date of merger are eliminated.

(14) Does not include: 1,181,818 shares of BN common stock initially reserved for issuance upon conversion of BN's 5 1/4 percent convertible debentures, due 1992; 580,545 shares of BN common stock reserved for issuance pursuant to the BN stock option incentive plan; 287,375 shares of BN common stock initially reserved for issuance upon conversion of the series A no par

Explanatory notes—Continued.

value preferred stock; 1,777,800 shares of BN common stock initially reserved for issuance upon conversion of the BN $2.85 convertible preferred stock issued on July 7, 1977 (see (8) above); and 540 shares of BN common stock held in the treasury. Also not included are 79,974 shares of BN common stock and 42,092 shares of $2.125 no par value preferred stock which may be reserved for issuance at the exchange rate for the merger transaction, for Frisco common stock, pursuant to the Frisco stock option plan.

POSITIONS OF PARTIES

Supporting the merger application are the U.S. Department of Defense (DOD), Boise Cascade Corporation, Care-Nicky Corporation, International Mineral and Chemical Corporation, Proctor and Gamble Company, Farmlands Industries, Inc., American Cast Iron Pipe Company, Amax Coal Company, Lamb-Weston, Weyerhaeuser Company, Shell Oil Company, Nabisco, Inc., and the Pacific Northwest Traffic League. The U.S. Department of Justice (DOJ) does not oppose the merger.

If the Commission imposes the stipulated conditions negotiated with applicants, the following carriers do not oppose the merger: the Atchison, Topeka and Santa Fe Railway Company (Santa Fe), Chicago and North Western Transportation Company (CNW), Illinois Terminal Railroad Company (ITC), the Family Lines, Southern Railway Company (Southern), Kansas City Southern Railway Company (KCS), Southern Pacific Transportation Company (SP), St. Louis Southwestern Railway Company (Cotton Belt), Union Pacific Railroad Company (UP), and Missouri-Pacific Railroad Company (Mopac). The stipulated conditions are set forth in appendix K. BN and Frisco support these conditions.

Six railroads are opposed to the merger. They are Chicago, Rock Island and Pacific Railroad Company, William M. Gibbons, trustee (Rock Island), Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Richard B. Ogilvie, trustee (Milwaukee Road or MILW), Soo Line Railroad Company (Soo Line), Illinois Central Gulf Railroad Company (ICG), Missouri-Kansas-Texas Railroad Company (MKT or Katy), and Denver and Rio Grande Western Railroad Company (DRGW or Rio Grande). Additionally, the Railway Labor Executives' Association (RLEA); John W. McGinness, Illinois Legislative Director of the United Transportation Union (UTU-IL); Railway Employees' Department, AFL-CIO (RED); M. S. Stuckey, General Chairman of United Transportation Union on Illinois Central Gulf Railroad Company (UTU-ICG); M. M. Winter, General Chairman of United

Transportation Union on BN (UTU-BN); Iowa Department of Transportation, Transportation Regulation Board (IA-DOT); Illinois Department of Transportation (IL-DOT); Kansas City Board of Trade (KC Board); Montana Wheat Research and Marketing Committee (MT-Wheat); Wyo-Ben, Inc.; Riceland Foods; Superior Corp.; and John W. O'Neil oppose the merger.

No parties support Soo Lines' requests for trackage rights over BN between Superior, WI, and (a) McGregor, MN, (b) Ochley, MN, and (c) Bald Eagle, MN. BN, Frisco, DOJ, and UTU-ICG oppose the request. BN and Frisco also oppose all other relief requested by Soo Line (set out in appendix K).

ICG's proposal for trackage rights over Frisco between Memphis, TN, and Jasper, AL, and terminal operations over Mopac in Memphis is opposed by BN, Frisco, DOJ, and UTU-ICG. BN and Frisco also oppose the other conditions sought by ICG.

The CNW proposal for trackage rights over BN between the Twin Cities and the Twin Ports over the White Bear Lake route is supported by BN and Frisco. However, DOJ opposes these trackage rights.

SP's proposed trackage rights in Portland, OR, are supported by BN, Frisco, and Crown Zellerbach. UP, DOJ, and UTU-ICG are opposed.

Milwaukee Road's proposed trackage rights to serve coalfields in eastern Montana are supported by the Wisconsin Power and Light Company (WI-P&L), Northern States Power Company, and the Western Energy Company, but opposed by BN, Frisco, DOJ, and UTU-ICG. BN and Frisco oppose other conditions sought by Milwaukee Road.

Rock Island's proposal for trackage rights over BN between Denver and Golden, CO, is supported by the Adolph Coors Company, the major shipper on the line. BN, Frisco, DOJ, and UTU-ICG oppose the trackage rights. Rock Island's use of the DRI&NW line is opposed by BN, Frisco, Termicold, Lamb-Weston, and Alcoa. Applicants oppose all other proposed protection for Rock Island.

The indemnity protection sought by MKT is supported by the Lower Colorado River Authority, La Barge, Inc., Breton Corporation, Clareden, Inc., the Denison Area Chamber of Commerce, and Gifford-Hill & Co., Inc. This condition is opposed by BN, Frisco, and DOJ.

DOJ also opposes the proposed indemnity conditions sought by Milwaukee Road and Rock Island.

The impact of the merger on each rail carrier participating in the proceeding and the relief requested are discussed separate below.

MILWAUKEE ROAD

Summary of Milwaukee Road's position

MILW contends that applicants have not shown the merger to be in the public interest. Many of its benefits could be accomplished without merger. Milwaukee asserts that 50 percent of all merger benefits attributed to the transaction would be derived from diverted traffic. MILW notes that applicants contend there is insufficient traffic to justify run-through operations short of merger; however, when diversions add to applicants' traffic base, such operations will commence.

MILW questions some of the anticipated benefits of the merger. It believes that applicants' "improved car supply" is an unsubstantiated claim, particularly in view of the impossibility of estimating the effect of internal traffic reroutings. Applicants' proposed minor reductions in overhead staff conflict with the BN chairman's offer of continued employment to all Frisco senior management, thereby destroying a prime merger economy. MILW also contends that another claimed economy, joint purchasing, could be done now without merger, but BN policy stands against it. MILW contends that the supporting shippers agree that they could not count on applicants' innovative ratemaking policies, which could occur without merger.

MILW points to other shortcomings in applicants' case. MILW notes that applicants failed to calculate any benefit from increased productivity, one of the foremost problems of the railroad industry. MILW points out that terminal congestion directly affects railroad productivity and that applicants' proposal does nothing to relieve the general problem at their Kansas City interchange. MILW fears that, with the elimination of applicants' interchange at Kansas City, the situation may become worse. It believes that the same result may occur at St. Louis. MILW contends that problems may stem from the necessary conversion of applicants' incompatible information/computer systems. MILW stresses that the slightest miscalculation easily could cause the monumental foul-up experienced following the Penn Central merger.

MILW asserts that neither applicant needs the merger to saves its service as each is a large, strong, and prosperous railroad. MILW

believes that BN's low rate of return for its transportation division must be considered in conjunction with its line-upgrading and construction investments, which would provide the rate of return relied upon by investors. MILW contends that merged, the applicants will be able to expand their return on investment exponetially, not arithmetically, to an extent overwhelming to competitors. Even if reorganzied, MILW asserts that its competition would disappear in the Chicago-Kansas City market and diminish in other markets as a result of this merger. MILW submits that the public interest will not tolerate that result and that the proposal must be denied.

Should the merger be approved, Milwaukee Road seeks imposition of conditions for its benefit. On brief Milwaukee Road abandoned its request to use BN's Dayton's Bluff Yard. It maintains its request for the following conditions: (1) access to BN's coalfields near Colstrip and Kuehn, MT, through trackage rights over BN lines from Miles City, MT; (2) indemnification for traffic losses since 1970 as a result of the *Northern Lines Merger* and losses from this merger, including the cost of labor protection, reduced by Milwaukee Road revenue gains as a result of conditions imposed for its benefit; (3) liquidated damages of $100,000 for every violation by the new company of any condition which may be imposed upon the merger; (4) revision of all joint-facility agreements between Milwaukee Road and BN to allow free assignment by Milwaukee Road of its rights; and (5) modified traffic conditions similar to the standard "DT&I conditions."[28]

Scope of operations

In 1976, Milwaukee Road operated in Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota, Washington, and Wisconsin. It entered bankruptcy on December 19, 1977. Since that date, Milwaukee Road has engaged in a massive abandonment program. Recently a majority of the Commission recommended to the bankruptcy court that Milwaukee Road be permitted to abandon all lines west of Miles City, MT (2,497.7 miles). The scope of future MILW operations will depend on the reorganizability of the carrier and the resulting configuration.

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[28] *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455 (1950).

Traffic diversion and net impact of merger

Milwaukee Road contends that applicants seriously understated the gains that will be achieved by the merged company, as well as the losses to competing carriers. Applicants admit that MILW will sustain a loss of $3,054,960. Milwaukee Road estimates that its losses as a result of the merger will be $14,089,930. Milwaukee Road firmly believes that the new company, with its inherent advantages of single-line service, abundance of equipment, and combined sales force, will have the ability to "outsell" its competition. Milwaukee Road's traffic study shows a $5.7 million loss in the first year after the merger is consummated and an $8.3 million loss in the second year. Milwaukee Road points out that applicants' traffic study excludes traffic that was moving entirely over other rail carriers' lines. Neither applicant studied traffic which did not appear in their records.

Milwaukee Road contends that the Commission should not regard as mere rhetoric applicants' boasts of the "synergistic effect" of the merged railroads' future success in wresting traffic from competitors. Milwaukee Road maintains the traffic losses it projected from the *Northern Lines Merger* fell far short of what actually occurred. (Milwaukee Road projected a loss of $16 million per year and claims that, at todays' average revenue per car to Milwaukee, its losses from that merger exceed $19 million.) BN's testimony reveals that new traffic not presently carried by applicants is a target of the merger. Milwaukee Road contends that the judgmental error made by Frisco as to divertibility (based on the existing Frisco system rather than on the merged railroads) is sufficient cause to discard the applicants' traffic study. Additionally, Milwaukee Road objects to the reliance by applicants on subjective factors such as "good relations" with customers to justify diversion estimates.

Applicants show a revenue loss of $3,054,960 in diverted traffic from Milwaukee Road, in contrast to the Milwaukee Road study showing $5,775,340 for divertible traffic. Milwaukee Road has submitted a chart of traffic movements which alleged accounts for $2,037,634 of the $2.7 million difference between Milwaukee Road's divertible traffic and applicants' conceded diversions. Milwaukee Road notes that the understated amount, coupled with applicants' admitted revenue diversions, results in a total loss of $5,091,794 on divertible traffic only. A comparison between applicants' and MILW's traffic studies shows that a difference of

only $682,746 exists. MILW contends that the close correlation between the traffic studies, as corrected, proves that applicants' traffic study was deliberately understated and is of no evidentiary weight.

MILW contends applicants were remise in not considering the long-term effects of the merger on competing railroads. In its study, MILW identified and quantified traffic not presently handled by either BN or Frisco, but subject to diversion upon consummation of the merger. It concluded a vulnerable category to identify the long-term impact of the merger. Milwaukee Road asserts that the merger will strengthen only applicants and their share of the transportation market at the expense of competing carriers. Further, as the strength of the applicants increases with the advantages the merger will create, the more vulnerable MILW's traffic becomes.

In MILW's traffic study, full value was given to the merged status of the applicants. MILW's traffic study shows that 10,480 cars and $5,775,340 in revenues were classified as vulnerable traffic. The total amount of cars to be diverted exceeds 23,000; the revenue diversions exceed $14 million.

Abandonment of Milwaukee Road's lines west of Miles City, MT would reduce Milwaukee Road's system substantially.[21] However, even with this reduction, Milwaukee Road alleges $7,991,635 will be either divertible ($3,740,224) or vulnerable to diversion ($4,211,411) as a result of the proposed merger. Milwaukee Road points out that additional single-line service between points such as Minneapolis-Chicago and Houston-Dallas-Oklahoma City, and Houston and Argo, IL only intensifies its problems.

MILW notes that applicants took the position that all but three railroads could survive the revenue loss caused by the traffic diversion by making a few economies. The three systems which concededly would not be able to adjust to diversions, but are candidates for liquidation, are Milwaukee Road, Rock Island, and MKT. Although MILW operations currently produce a large deficit, MILW is endeavoring to reorganize so as to minimize dislocations and the possibility of Federal intervention. Loss of $14.1 million or more in annual revenue is a lethal attack upon the foundation of the trustee's reorganization plan. MILW submits that it has exhausted the possibilities of practicing economies in operations. It has been

[21] A majority of the Commission recommended to the bankruptcy court that it permit Milwaukee Road to abandon these lines in AB-7 (Sub-No. 86), *Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company—Abandonment—Portions of Pacific Coast Extension in Montana, Idaho, Washington, and Oregon* (not printed), decided January 29, 1980.

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in bankruptcy since December 19, 1977, thus, deferring most prior debts. It is striving to abandon its money-losing lines, and 55 separate abandonment applications have been filed with the Commission since December 1977. Milwaukee Road expects most of the revenue it loses as a result of the merger to be translated directly to net loss. It suggests that such a loss could be disastrous, for it amounts to fully 5 percent of the revenues forecast under the trustee's reorganization plan.

Applicants address Milwaukee Road's arguments that (1) approval of the merger will interfere with the trustee's efforts to reorganize the Milwaukee Road, and (2) by diverting traffic from the Milwaukee Road, the merger will impair its ability to compete effectively with the new company. Applicants assert that neither of these arguments address the proper issue of whether the proposed merger will improve transportation services to the shipping public, but instead are premised on preservation of Milwaukee Road as a corporate entity.

As to the first argument, applicants assert that progress in railroad industry restructuring through end-to-end mergers must not be impeded while the reconfiguration or liquidation of bankrupt carriers is determined. Applicants suggest that the problems of bankrupt carriers are unrelated to this merger and that in the case of the Milwaukee Road there is substantial doubt as to whether it is reorganizable at all.

Applicants state that Milwaukee Road's second argument is also unfounded. The Milwaukee Road claims that diversions to the new company will impair its ability to compete with the new company in the corridors which both presently serve assumes that Milwaukee Road is today a viable competitor. Applicants dispute that assumption. Milwaukee Road is engaged in an ambitious abandonment program that may involve one-third of its system. Plans for abandonment include, according to applicants, the line between Muscatine, IA, and Kansas City, thus, removing Milwaukee Road from the Chicago-Kansas City market. Applicants also note that Milwaukee Road is involved in negotiations for the sale of substantial parts of its system. By its own withdrawal from transportation markets, Milwaukee Road has allegedly established that it is not presently a viable competitor and that the protective conditions it seeks would not serve the public interest.

Applicants also argue that Milwaukee Road has grossly exaggerated the impact of the proposed merger. Applicants estimate

that Milwaukee Road will lose $3,054,960 in gross revenue, with a resulting net revenue loss of $353,571 a year. Even the $3 million figure is said to be overstated because it is based on 1976 traffic. Since that time, Milwaukee Road has lost considerable traffic it formerly carried due to service deterioration and inadequate equipment. Applicants assert that a substantial portion of the predicted losses Milwaukee Road attributes to this merger have already taken place and will continue as a result of factors entirely unrelated to this merger. Therefore, applicants argue, the plight of Milwaukee Road should not be used as a basis to deny the merger.

Impact on shippers—loss of service

Milwaukee Road asserts that depletion of its revenue base caused by the merger directly will cause cessation of service. Milwaukee Road states that continued service on its Chicago-Kansas City route presently is justifiable. However, it is highly probable that the revenue losses over the Kansas City gateway seriously will deter MILW's participation in this competitive market. Retention of MILW's Chicago-Kansas City route despite loss of interchange traffic from the BN-Frisco merger would place Milwaukee Road in immediate jeopardy.

MILW points out that IA-DOT believes that in the present proceeding, important rail service may be lost and competition eventually retarded and, in many areas, lost altogether. MILW believes that the opinion of IA-DOT should be afforded particular weight because of the State's familiarity with the economic problems of MILW and other of its serving railroads and the State's knowledge of the needs of its commerce. MILW notes that continued service over its main line to Iowa interior points (Chicago-Omaha) is not a part of the trustee's reorganization plan. However, permutations of the trustee's reorganization plan may permit continuance of MILW service in the grain gathering areas. MILW service along eastern Iowa on the Chicago-Kansas City route would continue if the Kansas City interchange traffic does not disappear through the diversionary impact of this merger.

Applicants state that Milwaukee Road has failed to introduce any evidence that its claimed traffic diversions will impair any essential transportation services offered to the shipping public. Applicants argue that there is considerable excess rail capacity in the Midwest and that, in the event of cessation of service or liquidation of a bankrupt carrier such as Milwaukee Road, other viable carriers will

be available to provide service over economically feasible lines. As support for this position, applicants cite Milwaukee Road's own program of sale and abandonment of trackage. These activities, according to applicants, indicate that other viable carriers will be called upon to assume Milwaukee Road's services regardless of this merger. Applicants suggest that by emphasizing the need to preserve its current corporate structure instead of preservation of essential transportation services, Milwaukee Road has failed to present a case against the merger.

Applicants also argue that Milwaukee Road's reliance on Iowa as an example of lost service is misplaced, for Milwaukee allegedly plans to dispose of most of its facilities in Iowa as part of its reorganization plan whether or not the merger takes place. Moreover, applicants assert that other midwestern railroads have expressed great interest in purchasing Milwaukee lines in Iowa.

Impact on employees

Milwaukee Road suggests that its expected loss of $14,090,000 a year will result in a general reduction in its employment of about 5.5 percent. Milwaukee Road estimates that reductions will involve the following: 26 executive personnel, 137 professional and administrative, 116 maintenance of way and structures, 115 maintenance of equipment and stores, 42 transportation, and 215 train and engine.

Milwaukee Road states that a specific element to be considered separately is train and engine service. Where a reduction in switch engines or some road trains is made, affected engineers would be permitted under labor agreements to fill presently unneeded and unfilled fireman positions. While a job would thus, exist for such individuals, Milwaukee Road would incur the additional cost. Brakemen and switchmen involved in train crew reductions would exercise seniority to take unfilled second brakemen or second yard helper positions not then being filled under "Crew Consist" agreements, thus, resulting in additional costs.

In addition, certain labor agreements provide outright protection to employees, such as the February 7, 1965 agreement covering maintenance of way and signalmen; the September 25, 1964 agreement covering shop crafts; the June 16, 1966 agreement covering train dispatchers; and an agreement on Milwaukee Road covering dispatchers, clerks, agents and operators. Milwaukee Road could be faced with certain labor protection costs under these

agreements when reductions would be necessary to offset lost revenue due to a BN-Frisco merger.

The "ripple effect" of the merger could also affect the operation of specific trains, the loss of this business resulting in the possible reduction of train and enginemen service assignments or pool crews in the territory feeding into, for example, Kansas City. The reduction could take the form of outright discontinuance of a train or annulment of a train on certain days, reducing the number of crews. Other crafts supporting the train operation could also be affected by the reduction in train service.

Applicants do not believe they should bear any of the labor protection costs claimed by Milwaukee Road since those costs arise from agreements negotiated between Milwaukee Road and its employees independently and are not related to the merger.

Protective conditions

If the merger is approved, MILW urges the Commission to exercise its power to improve MILW's position and enhance its essential rail services. MILW contends that if this merger is approved without the conditions it seeks, its Chicago-Kansas City market is placed in jeopardy despite its use of Rock Island trackage in that corridor. Several of the conditions originally requested by Milwaukee Road were dismissed or otherwise disposed of during the hearing. On brief, Milwaukee Road withdrew its request to use BN's Dayton's Bluff Yard. The conditions which are still actively sought by Milwaukee Road are discussed below.

Access to coalfields.—Milwaukee Road requests trackage rights over BN from Miles City, MT to the coalfields near Colstrip, MT and Kuehn, MT, a distance of 138.9 miles. MILW would be authorized to serve only movements to its own destinations on connecting lines that are not served by BN. The condition is designed to permit MILW direct access to the mines for coal traffic presently delivered to MILW customers at Twin Cities and in Wisconsin. MILW now receives this traffic from BN at Miles City and Twin Cities. The traffic is controlled by BN as origin carrier so that no more than one-half of the traffic is allowed over MILW from its first junction point with BN. If the Commission imposes this condition, MILW would be able to provide single-line service to its customers. Since the additional traffic is expected to yield in excess of $12.7 million annually, MILW's financial stability would be improved and its position as an intramodal competitor enhanced.

MILW notes that its line between Miles City and the Twin Cities is underutilized and can accommodate the increased traffic immediately. MILW contends that these operations would offset partially the reductions in employment otherwise caused by the merger.

MILW asserts that applicants' rebuttal evidence is entitled to little or no evidentiary weight. MILW believes that its projected $12.7 million annual revenue gain may be expanded to reflect current traffic, but will not divert the $51 million "vast coal revenues" projected by applicants. MILW urges us to compare the diversion of $12.7 million (1976 traffic base) to BN's 1978 coal transportation revenues of $499 million.

Three shipper witnesses support Milwaukee Road's application for trackage rights. Western Energy Company, a coal mining concern, supports the application as a means of introducing direct competition in a transportation market substantially served by BN alone. Northern States Power Company uses coal from the Montana fields in the generation of electricity in Minnesota. Northern States Power Company feels that such competition is necessary to insure an adequate supply of equipment in good working order, coordination of train movements with mine and powerplant schedules, and optimal carrier efficiency. WI-P&L supports the request to insure the continued operation of Milwaukee Road's line from Miles City to St. Paul. Presently 50 percent of this shipper's coal shipments from Montana move over the Milwaukee Road line from Miles City; the balance moves over BN. WI-P&L seeks to maintain the flexibility offered by the alternate route as well as insure capacity to move expanded volumes of coals in the future. It also recognizes a potential savings in an alternative single-line haul from the mine.

Milwaukee Road asserts that imposition of this condition would be in the public interest, and that competition for BN in this market is amply justified by the record. To assure that trackage rights operations commence immediately upon consummation of the merger, MILW suggests that the Commission mandate the terms of trackage rights using the model contract proffered by MILW.

Applicants argue that the proposed trackage rights would divert vast coal revenues from the merged company, would result in uneconomic duplication of resources and impairment of existing BN service to the public detriment, and if granted, would preclude consummation of the merger.

Applicants vigorously contest the $12.7 million revenue gain projected by Milwaukee Road from access to BN's coalfields. Applicants conclude that the pool of traffic subject to diversion is much greater. Northern States Power Company and WI-P&L, two utilities which would be served by Milwaukee Road if the condition were granted, project a need for 6.8 million tons of coal in 1980. At current rate levels, BN states, that would equate to $51 million. BN notes that Milwaukee Road also would be able to serve Central Illinois Lighting Company if the condition were granted. Divertible annual tonnage for this shipper amounts to 1 million tons, or revenues of $14.7 million. Shipments to Montana Power Company could also be diverted. This movement currently involves 600,000 tons of coal and produces $1.2 million annually.

Applicants suggest that cash flow pricing would compound Milwaukee Road's diversion of Montana coal traffic. BN argues that Milwaukee Road's unsound financial condition will force Milwaukee Road to underprice its coal service in order to generate needed short-term revenue. When such pricing drops below normal fixed costs it allegedly becomes destructive because a loss is incurred on each car shipped. BN points out that other carriers cannot reduce prices to such an unprofitable level on a sustained basis and would therefore lose a greater portion of the traffic. Applicants argue that below-cost pricing is inconsistent with the public interest, particularly when practiced in a capital intensive industry. Applicants point to past instances where Milwaukee Road shippers have opposed Milwaukee Road rate reductions as evidence of the possibility of destructive pricing. Applicants also assert that Milwaukee Road's coal rates to the utilities supporting the proposed condition are presently depressed and that this may explain the shipper support.

Applicants' second reason to deny the proposed condition relates to duplication of facilities. BN has undertaken major capital expenditures to develop capacity for the Montana coalfields. By 1982, BN projects that it will have spent $130 million in coal-related capital improvements such as track and siding improvement, signaling, and car repair facilities. BN asserts that these extraordinary expenses will not be recoverable if the requested condition is imposed.

BN questions Milwaukee Road's ability to upgrade its facilities to the extent required to handle this coal traffic. Even if Milwaukee Road can finance the necessary improvement of its plant, BN argues the result would be an uneconomic duplication of the investment

already committed by BN. BN alleges that such duplication would create excess capacity and is contrary to the public interest. Additionally, as traffic is diverted from BN and its volume decreases, rates on remaining coal shipments would have to rise partially to offset BN's investment in improvements. Thus, applicants argue that the impact on coal users and consumers of electricity ultimately will be adverse.

Finally, BN asserts that the high level of diversion to be expected on this traffic, which BN projects will eventually reach $50 million a year depending on factors such as timing of equipment acquisition, would completely erode the financial benefits of the merger and preclude its consummation.

Indemnification.—MILW notes that idemnification has been imposed by the Commission as a condition on previous mergers.[22] MILW contends that this record demonstrates the need for indemnification to be imposed again. MILW requests monthly cash indemnification of its traffic losses as a result of the *Northern Lines Merger* (since 1970) and the BN-Frisco merger, including absorption by BN of the cost of labor protection for MILW employees furloughed as a result of traffic losses to BN. MILW suggests that the Commission could enforce indemnification for traffic losses and labor protection, requiring special reports of applicants and those railroads it has found would be likely to incur traffic losses. The offset of revenue gains from trackage rights and other conditions could be accommodated in a reporting system to be implemented and maintained by the Commission.

Applicants argue that: (1) Milwaukee Road has submitted no factual evidence to support its requests for indemnification for diversion resulting from the *Northern Lines Merger* or costs of labor protection; (2) revenue indemnification is an inappropriate remedy for a bankrupt carrier because it is a short-term remedy, calculated to allow an affected carrier to adjust to a merger, and cannot be a means of revitalizing a bankrupt carrier; and (3) Milwaukee Road has not suggested any method of administering its proposal, foreclosing proper evaluation. For these reasons, as well as the objections set forth in the discussions of the Rock Island and MKT indemnification proposals, applicants argue that these conditions should not be imposed.

Liquidated damages.—MILW proposes that BN be required to pay MILW $100,000 in liquidated damages for each violation of any

[22] *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556, 616-617 (1974); and *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 561-563 (1966).

merger condition. This would supplant the present method of litigation, including proof of damages. MILW has found that the cost of litigation and difficulty of proof outweigh the likelihood of success in a merger violation case. MILW considers $100,000 an appropriate amount due to the large revenues involved in any recurring movement and the lapse of time inevitably occurring before a violation comes to the attention of the deprived carrier.

Applicants describe the proposed liquidated damages as an incredibly one-sided power to confiscate property, a penalty, regardless of the nature of any violation or injury caused. Applicants state that they will abide fully by any conditions imposed by the Commission and if Milwaukee Road feels that such compliance is not forthcoming, it should be able to establish that fact before an impartial arbiter and recover its actual damages. Finally, applicants assert that Milwaukee Road has introduced no evidence that $100,000 approximates any damages it might sustain from a violation.

Revision of joint facility agreements.—MILW contends that a revision of its joint facility agreements is needed for its restructuring process and to prevent BN's abuse of its power. MILW points out that BN's practices regarding a successors and assigns clause has varied widely and that BN uses its bargaining power to determine terms.

MILW wants the right to allow other railroads to use, lease, sublease, or buy its rights in all joint facility agreements with BN. MILW explains that this condition simply would require a normal "successor and assigns" clause in any present or future joint facility agreement with BN. MILW notes that a clause requiring prior consent to any operations by a successor or assignee is used by BN as a powerful competitor. As MILW pursues reorganization, its efforts increasingly are inhibited by BN's refusals to permit assignment to purchasers of MILW property. MILW notes that the Commission has continuing jurisdiction over the reformation of trackage rights agreements that it has approved. However, with respect to agreements executed before the 1940 Transportation Act, Commission jurisdiction does not vest until the agreements expire by their own terms. Many of MILW's trackage rights agreements with BN were executed prior to 1940. MILW believes that imposition of Commission jurisdiction over such agreements, whether or not entered before 1940, as a condition of the merger would materially assist MILW's reorganization and restructuring efforts.

Applicants argue that existing agreements in the industry normally prohibit assignment without agreement of both parties because unrestricted assignment of rights renders it impossible accurately to assess the costs and benefits of such arrangements. Applicants believe the Commission should not rewrite existing contracts negotiated freely between the parties. Nor should it mandate the use of a successor and assigns clause in future contracts. To do so would impede efforts to reach joint facility agreements.

Applicants suggest that imposition of such terms in trackage rights conditions is particularly unjustifiable because conditions are imposed for the benefit of the protected carrier. Permitting a condition imposed for the benefit of one carrier to be assigned to another would result in an open-ended condition incapable of analysis.

Standard traffic conditions.—MILW seeks to reform the so-called "DT&I conditions" to eliminate the alleged frequent evasion of that set of conditions with respect to traffic, industries, and rates not existing prior to merger. MILW also points out that the DT&I conditions do not speak to the quality of service afforded and do not give protection as to schedules affording effective connections or other factors important to maintaining service on a competitive basis. MILW believes that the Commission should terminate controversy where possible by reforming its conditions toward certitude.

Applicants argue that Milwaukee Road has shown no reason to depart from the standard traffic conditions and, therefore, only those conditions should be imposed.

Applicants' response to Milwaukee Road

According to applicants, the problems confronting the bankrupt Milwaukee Road are both complex and longstanding, and clearly unrelated to this merger. Whether or in what form the Milwaukee Road has a viable future can only be addressed in the separate reorganization proceedings which will alone determine the ultimate fate of this carrier. Applicants argue that it is speculative to predict the nature or extent of the impact of this merger on a reorganized Milwaukee Road (assuming the road is not liquidated) or to attempt to formulate protective conditions to adjust to such impact.

Applicants further argue that Milwaukee Road has based its case on the need to maintain it as a corporate entity. Milwaukee Road has ignored the basic question of whether continuation of its

services is essential to the public interest or whether other carriers could furnish those services.

Applicants assert that the conditions proposed by the Milwaukee Road are unsupported by the evidence and that there has been no showing that they are consistent with the public interest. If granted, applicants state these conditions would severely undermine the feasibility of the merger. Granting the proposed trackage rights to Montana coalfields would preclude consummation of the merger, they maintain.

ROCK ISLAND

Rock Island operated in Arkansas, Colorado, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Texas. Its main routes were between: Chicago and Tucumcari, NM, via Kansas City; St. Louis and Tucumcari via Kansas City; Memphis and Tucumcari via Little Rock, Oklahoma City, and Amarillo; Chicago and Denver via Council Bluffs and Omaha; St. Louis and Denver via Kansas City; the Twin Cities and Galveston via Des Moines; Kansas City, Fort Worth, Dallas, and Houston; and Chicago and Minneapolis and Galveston.

Rock Island sought protection under the Bankruptcy Act on March 17, 1975. In September 1979 the Commission found that Rock Island was unable to continue operations, and directed another carrier to provide temporary service over Rock Island's lines. The reorganization plan filed December 28, 1979 was rejected by the bankruptcy court in a January 25, 1980 order that also required the trustee to file a plan of liquidation by February 19, 1980.

Rock Island's present status as a carrier which has failed in its attempt to reorganize and has been ordered to present a plan of liquidation disqualifies it from protection in this proceeding. However, Rock Island's evidence is on record and will be considered insomuch as it affects the rail transportation system as a whole.

Summary of Rock Island position

Rock Island believes that this end-to-end merger of two financially strong railroads should be denied. It argues that the merger will not allow abandonment of redundant tracks, will offer

no new service, preserve no essential service, is ultimately anticompetitive, and should not be approved.

Rock Island fears that the impact of the merger will be disasterous on the already troubled midwestern railroads. The creation of applicants' proposed system would place in jeopardy of extinction an even larger network of carriers now operating. It suggests that to some undetermined extent, diversion resulting from the *Northern Lines Merger* are responsible for the present difficulties of the midwestern railroads, including Rock Island. In arguing against approval of the merger, Rock Island points to expected massive diversion from existing carriers, creation of an economic giant able to work its will through sheer size, and creation of an unlawful common control situation among Rock Island, Frisco, and potentially, the merged company.

Rock Island seeks primarily a denial of the merger, but argues that if the merger is granted it must be conditional for the protection of protesting carriers. Rock Island seeks imposition of conditions allowing it trackage rights; opening a line of railroad to reciprocal switching; indemnification; alteration of existing routes and division; divestiture of certain interests of shareholders in Rock Island who are associated with applicants; and modified traffic protective conditions.

Traffic diversion

Applicants concede that about $4.5 million of traffic will be diverted from Rock Island as a result of the merger. This figure reflects test period traffic in which either BN or Frisco participated. Rock Island estimates that it will lose another $4.1 million in diversion from traffic which the applicants' study did not consider. Further, these figures do not reflect the synergistic effects of the merger.

Rock Island expects the cost savings from this diverted traffic to be small and provide little effective offset to the revenue losses. It predicts that no savings in costs related to train-miles and switch engine tricks will be possible due to widespread dispersion of its traffic losses. As an example, the Kansas City-Topeka-Herington, KS, line segment will feel the maximum impact of the merger. Traffic losses on this segment are expected to total 17,600 cars annually (consisting of 9,700 loads and 7,900 empties). On a daily basis the reduction will total 13 loads and 11 empties in each direction. Rock Island states that this is insufficient to permit

reductions in the number of trains operated. No savings are projected in switching costs because reductions in volumes at its terminals is insufficient to allow reduction in switch engine tricks.

Rock Island expects a savings of approximately $959,000 a year based on reduced fuel consumption. It also expects savings of $122,000 in joint facility expenses which are proportionate to the number of cars handled. Car and trailer-hire expenses should be reduced $1,545,000.

Combining all these, Rock Island expects a total merger-related savings of $2,626,000. The net impact will be a loss approximately $5,974,000.

Applicants reject Rock Island's reputed add-on diversion study on four grounds. First, they consider the concept unrealistic. Applicants are now competing in the markets which will be served after merger and consider the likelihood of diversion of traffic in which they do not now participate to be low.

Second, Rock Island attributes to the merger extensive losses on traffic which it has already lost for various other reasons. Rock Island has been in bankruptcy since 1975, and, applicants allege, its system began to deteriorate several years prior to that time. Accordingly, a substantial amount of the projected losses have already occurred. Moreover, Rock Island predicted losses on its "Tucumcari" line between Santa Rosa, NM, and St. Louis, which Rock Island has agreed to sell to SP,[23] with SP taking over all traffic on the line.

Third, the Rock Island study includes specific movements which applicants consider nondivertible. Applicants point out that the Rock Island analysis was of traffic for which the applicants competed in 1976, but which they were unable to obtain despite Rock Island's poor condition following bankruptcy. Applicants cite as specifically unjustified Rock Island's claimed loss of $1.2 million on local traffic; $1.6 million on interline received traffic on which Rock Island provided termination service; and nearly $600,000 on interline forwarded traffic where Rock Island provided origination services.

Applicants point out that 312 study movements, on which Rock Island claimed $2,622,121 in losses, were claimed to be divertible, with the most common reason for diversion being the merged

[23]Now pending in Finance Docket No. 28799 (Sub-No. 1). Temporary authority for SP's subsidiary, the Cotton Belt, to operate over the Tucumcari line was granted December 6, 1979 in *St. Louis S. W. Ry. Co.—Temp. Authority—Chicago*, 360 I.C.C. 539 (1979).

company's new single-line haul or improved transit times. Applicants state that such diversion are unjustified in light of the comparable service presently offered over the study movement routes by Santa Fe, Mopac, Rock Island itself, and the existing BN and Frisco. Another $582,138 of claimed losses came on traffic on which Rock Island was the switching carrier for either the shipper or the consignee, and $547,820 on traffic moving in Rock Island equipment.

Finally, applicants argue that the Rock Island study deserves no weight due to the inconsistencies attributable to the lack of a true final evaluator. Applicants point out that the Rock Island's final evaluator was not selected for that role until 5 months after the study was conducted.

Applicants also disagree with Rock Island's estimates of the potential savings in costs of handling diverted traffic. Applicants applied Rail Form A costing methodology to reach a net diversion of $932,725.

Common control

Rock Island argues a unique adverse impact of the merger regarding one of its stockholders, Henry Crown. Rock Island alleges that Crown presently controls, or has the power to control, Frisco and the Sioux City and New Orleans Barge Line (SCNO Barge), a regulated water carrier; and that he formerly exercised a high degree of control over the Rock Island through his positions on its board of directors and finance committee and ownership of common stock and bonds.[24] According to Rock Island, Crown has used his status as a Rock Island shareholder to obstruct and delay its attempts to reorganize. Rock Island suggests that, if the merger is consummated, Crown will be the largest single stockholder in the new company, with holdings amounting to approximately 2.7 percent of the merged company's stock. Additionally, Rock Island finds evidence of control of Frisco in the fact that Elliot H. Stein, a director of Frisco, a member of its finance committee, and chairman of its executive committee, is president of a brokerage firm which has the Crown holdings in its street name. Mr. Stein voted the Crown shares in favor of the merger.

[24] Crown's interests are as follows, according to Rock Island: (1) approximately 9 percent of Rock Island common stock, 17 percent of Rock Island first mortgage bonds, and 48 percent of Rock Island income debenture bonds; (2) almost all the stock of SCNO Barge; and (3) approximately 17 percent of the outstanding Frisco stock, the largest single holding.

Rock Island argues that it is against the public interest to permit Crown to acquire control of the new company, while maintaining his ability to frustrate Rock Island.

Applicants argue that Rock Island has endeavored to inject longstanding, but unrelated, controversies between itself and its stockholders into this merger proceeding. They maintain that Crown has not been shown to control either Frisco or Rock Island. They state that the Commission has denied a petition seeking a finding of unlawful control of SCNO Barge, Frisco and Rock Island.[25] Applicants conclude that Rock Island's position is based on unfounded statements and innuendo and should not impede the merger.

Additional issues

Rock Island has raised two additional issues. First, the transfer of Frisco's motor carrier subsidiary is assertedly unsupported by the evidence. Rock Island notes that traditionally a greater burden has been imposed upon applicants in a proceeding in which a rail carrier seeks to acquire motor carrier operating rights than upon other types of applicants. Rock Island suggests that the Commission may only approve such a transfer if it finds that the transfer is consistent with the public interest, that the applicant can use the rights to public advantage, and that the transfer will not unreasonably restrain competition.

No public witnesses supported the transfer of the motor carrier operating rights. An exhibit was introduced to show that the motor carrier subsidiary will continue to operate as it has in the past, in support of the Frisco's rail operations. Applicants contend that the only change will be that the motor carrier's parent rail company will be stronger. Specifically, applicants envision no substantial change in traffic flows as a result of BN's affiliation with FTC.

Additionally, Rock Island renews its objections, made at the hearing, that the motor carrier transfer application was not timely filed. The Administrative Law Judge correctly denied this objection and we will do the same.

The second additional issue raised by Rock Island involved the detailed environmental impact report (DEIR) submitted as part of the application. Since the DEIR only studied applicants' operations

[25] Finance Docket No. 24660, *Investigation of Control of Sioux City and New Orleans Barge Lines* (not printed), decided December 9, 1968.

and failed to reflect the impacts of the merger upon other railroads, Rock Island contends that it is inadequate.

Applicants maintain that Rock Island's attack on the DEIR is inappropriate since Rock Island was given an opportunity to comment on environmental issues which it felt were not properly considered. Additionally, applicants note that Rock Island's objections were premature, coming as they did prior to the filing of a final environmental impact statement by the Commission's Section of Energy and Environment. We agree. The environmental impacts of the merger are discussed in this decision.

Employee impact

Rock Island estimated that 300 employees would be laid off as a result of the merger, based on 1976 operations. Applicants questioned the methodology used to reach this number and Rock Island's failure to consider other mitigating factors.

Proposed protective conditions

Compensatory conditions

Rock Island has asked for four compensatory conditions: entrance into Golden, CO; opening of industries along the DRI&NW line between Davenport and Clinton, IA, over which Rock Island presently operates with closed doors; a formula for direct monetary offset; and division and routing changes.

A. *Trackage rights.*—Golden, CO is part of the metropolitan Denver area, 11 miles from Denver itself. Rock Island presently serves Denver but is unable to serve Golden since it is outside the Denver switching district and not subject to reciprocal switching. Entrance to Golden would eliminate an interchange and generate longer hauls for Rock Island. The elimination of the interchange will improve Rock Island service and permit expedited service from Golden to the Denver interchange with UP and D&RGW. Additionally, Rock Island has trackage rights over D&RGW to reach its own tracks.

The Rock Island's entry into Golden was supported by Adolph Coors Company (Coors), which operates a brewery at Golden. Coors is unhappy with present service and considered building its own short-line railroad to connect with other roads at Denver. Rock Island suggests that this condition would not only relieve the impact of the merger, but also serve a public need.

Rock Island claims that the use of the existing tracks into Golden along the C&S, a BN subsidiary, will not interfere with existing operations. BN currently generates only 10 to 15 cars a day along this line from industries other than Coors. There are three round trips a day to Coors in the heavy season and two a day in the light season. Rock Island states that it could communicate with the merged company to prevent any interference on this line. Prospective Rock Island operations can be accomplished with present force and power, with the addition of one crew.

It is estimated that this condition will gain Rock Island $750,000 for longer hauls on 1,100 cars in the first year, $2 million on 5,000 cars in the second year and another 10 percent in year three.

Applicants contend that the trackage rights would not accomplish the benefits claimed and would result in severe operating problems for applicants and deterioration of service to shippers. They also argue that the proposed rental of $1 a year is inadequate in light of the benefits Rock Island expects to receive ($1,290,608 a year).

The benefits from this condition are alleged to be improved service to Coors and increased road-haul revenues on traffic to or from Golden. While Coors received less than optimal service in 1978, the problem was due to a nationwide demand for railroad cars and, according to applicants Rock Island could provide no better service in this circumstance. Major commitments of equipments are required. Applicants also dispute the alleged interchange benefits with UP and D&RGW.

Applicants note that Rock Island can presently participate in Coors movements without trackage rights if its service merits use, for Coors can control the routing of its traffic. Thus, applicants maintain that the requested trackage rights would result in greater switching, require construction of a passing siding to minimize interference with existing operations, require closer control of operations, and obstruct applicants' operations at their Golden Yard.

Finally, since Rock Island is negotiating the sale of its Kansas City to Denver line, applicants suggest that this condition, if granted, should be made nonassignable.

B. *Reciprocal switching.*—Rock Island also seeks the opening of industries along DRI&NW, which is owned jointly by BN and Milwaukee Road. Rock Island presently operates over this line with closed doors except as to service to the Iowa Illinois Gas and Electric Company. If Milwaukee Road would not agree to the

proposed rights, Rock Island seeks transfer of BN's interest in DRI&NW. The value of switching these industries to Rock Island is estimated at $738,534 a year.

Milwaukee Road has expressed its opposition to any such condition. Thus applicants find the initial condition is not feasible. With regard to the alternate condition of a transfer of BN's interest, applicants allege Rock Island has introduced no evidence that such a transfer would be consistent with the public interest. In fact, shippers along this line oppose the substitution of Rock Island service for BN service. Finally, applicants note that the proposed alternative condition is ambiguous and unable to be implemented.

C. *Indemnification.*—Rock Island has also requested an indemnification condition as compensation for merger diversions as set forth in appendix K. The formula suggested by Rock Island will produce $1,328,000 a year based on Rock Island's traffic estimates, and, according to Rock Island, would produce only a partial restoration of the expected diversions.

Applicants vehemently oppose the revenue indemnification proposal for seven enumerated reasons.

First, Rock Island's business has steadily deteriorated over the past several years for reasons unrelated to the merger, and applicants assert this trend will continue whether or not the merger is consummated. They argue that it is inappropriate to require the merged company to guarantee to the Rock Island a premerger level of business when, without the merger, Rock Island's revenues would progressively deteriorate.

Second, the request for forwarded diversionary losses raises serious practical problems. This request places the merged company in the position of indemnifying the Rock Island for something over which the merged company has no control, the shortfall in the number of cars Rock Island itself delivers to the new company.

Third, severe administrative problems arise from the number of interchange points at which annual calculations would be required.

Fourth, revenue indemnification formulas as proposed by Rock Island have never been tested.

Fifth, the formula requested is inflexible and provides no basis upon which to distinguish traffic losses caused by the merger from those caused by other events, such as a recession or crop failure.

Sixth, the formula is inherently anticompetitive since it guarantees the Rock Island a predetermined level of business regardless of its performance. It also interferes with the allocation of

traffic between carriers because the merged company will deliver as many cars as feasible to Rock Island in order to minimize indemnification payments.

Seventh, imposition of such an open-ended financial obligation will make it impossible to determine the financial feasibility of the merger proposal.

D. *Divisions.*—Rock Island seeks alteration of existing divisions and routings as set forth in appendix K.

Applicants state that Rock Island's request for modifications in divisions and routing is both inappropriate and unsupported. It is not based on potential effects of the merger but rather on perceived inequities in existing divisions. Specific procedures exist for altering divisions, and applicants suggest that the Commission should not allow Rock Island to evade these procedures.

Divestiture

As a condition to merger, Rock Island requests that Henry Crown, who is not a party in this proceeding, be required to divest himself of all interest in Rock Island.

Applicants argue that without evidence to support a finding of control by Crown of the involved carriers, the Commission does not have jurisdiction over Crown or the Crown interests. Further, since applicants cannot control Crown's actions, a condition requiring the divestiture of Crown holdings would block consummation of the merger.

Traffic protective conditions

Rock Island also seeks imposition of the standard DT&I traffic conditions. These conditions are designed solely to preserve Rock Island's opportunities to compete with the new company and are not compensatory. Rock Island asserts that these conditions do nothing to mitigate the impact of the anticipated diversions and, while they should be imposed, must be strengthened.

Rock Island has specifically requested imposition of the modification of the DT&I conditions agreed to by applicants in the protection of Mopac. These conditions also are set forth in appendix K.

Applicants offer to submit to "standard" DT&I conditions in favor of the Rock Island, but vigorougly oppose imposition of conditions similar to those agreed to with Mopac. Applicants note that the Mopac conditions were part of a stipulation with that carrier

reflecting circumstances different from Rock Island, notably a projected $7.75 million merger-related revenue loss to Mopac, compared to $4.5 million for Rock Island.

Applicants' response to Rock Island

Applicants argue that: (1) a merger proceeding is not the appropriate forum in which to resolve the complex, unrelated problems of a bankrupt carrier which is presently the object of reorganization; (2) the arguments advanced by Rock Island opposing the merger are unpersuasive and fail to consider the benefits to the public accruing as a result of this merger; and (3) the conditions sought by Rock Island, if granted, would not resolve the problems of that carrier, but would undermine the feasibility of the proposed merger.

Applicants assert that Rock Island has failed to show that essential transportation services are threatened by the merger. On the contrary, applicants assert that Rock Island's current service will not be impaired because Rock Island already has far more business than it can handle adequately.

Even if Rock Island allows some service to deteriorate, the question remains whether such service is essential. Applicants argue that Rock Island's service has already deteriorated to an unacceptable point and that if it were discontinued, other carriers would step in and continue profitable services. Applicants claim that the Rock Island's performance of services is not essential and does not qualify for protection in this proceeding.

Applicants also argue that the Rock Island has failed to demonstrate that any of its five conditions are consistent with the public interest. On the contrary, they assert the requested conditions are inimical to the public interest.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Summary of Katy's position

Katy argues that the proposed merger is predatory and not only will adversely affect the entire rail transportation system in the United States, but will be particularly harmful to Katy. Katy argues that BN will be invading the Kansas City-Texas corridor, where an adequate number of carriers already provide service. Katy believes that in territories such as this, where there is little or no evidence of dissatisfaction with service, the harm to existing carriers and the public they serve outweighs the benefits. Therefore the merger should be denied.

Katy believes that if merger is authorized, Katy will require protection, and traffic conditions will not suffice. Katy rejects inclusion as a remedy because it is too extreme a measure in the face of the more reasonable alternative of indemnity. Katy maintains that indemnity is an appropriate price for the opportunity to attract other carriers' traffic while at the same time reducing operation costs.

Katy believes that indemnification is a proper remedy for Katy since its ability to provide adequate service will be jeopardized as a result of the financial harm the merger will cause Katy. It does not believe it could withstand diversion of the amount anticipated.

Katy argues that its indemnity formula is fair, just and reasonable. Katy believes that its revenue base should include traffic that will be diverted that is currently interchanged with nonmerging railroads, as well as traffic that is currently interchanged with the merger applicants.

Scope of operations

Katy serves Kansas, Missouri, Oklahoma and Texas. The carrier's main lines extend from Kansas City (Missouri and Kansas) and St. Louis, MO through Parsons, KS, Fort Worth, and Dallas, to San Antonio, Houston, and Galveston, TX. Major branch lines extend from (1) Garvin, KS, to Joplin, MO; (2) Chase, through Tulsa to Sand Springs, OK; (3) McAlester to Oklahoma City, OK; and (4) Fort Worth through Wichita Falls, TX, to Altus, OK.

The heaviest traffic density route is from Kansas City to Houston via Parsons, McAlester, and Fort Worth. The density on this route in 1976 and 1977 ranged between 6 and 13 million gross tons per mile annually. Traffic is roughly twice as heavy southbound as northbound. All other MKT lines handled less than 5 million gross tons per mile in 1976 and 1977.

Katy's principal points of interchange in the northern portion of its system are Kansas City and St. Louis, at which 71,857 and 28,467 carloads respectively were interchanged in 1976. All other major Katy gateways (at least 5,000 carloads) are in Texas.

Kansas City is the carrier's most important interchange point for traffic moving between South-Central States on the one hand, and Northwest and North-Central States as well as British Columbia on the other hand. This traffic accounted for over 32,000 of the 71,857 carloads interchanged; approximately 46,000 carloads (60 percent

of the total movements) were received from connections and terminated on Katy. Almost 16,000 of the carloads interchanged at Kansas City moved on Katy as bridge traffic.

Three railroads accounted for the bulk of Katy's interchange at Kansas City—BN, CNW, and UP. In 1976, UP interchanged 20,171 carloads with Katy, of which over 12,000 terminated on Katy. BN and Katy interchanged over 14,000 carloads, of which nearly 9,600 terminated on Katy and nearly 2,000 originated on Katy. CNW and Katy interchanged 10,627 carloads, of which 7,315 terminated on MKT. In addition, Milwaukee Road and N&W each interchanged approximately 8,000 carloads with Katy, and in each instance about 60 percent of the movements terminated on Katy.

The St. Louis gateway serves Katy mainly as an interchange point with eastern district railroads. Katy interchanged less than 1,000 carloads with applicants at St. Louis in 1976.

In Texas, MKT interchanges with Frisco at Denison and Dallas-Fort Worth. Katy and FW&D interchange traffic at Dallas-Fort Worth and Houston, the latter point involving only 472 carloads in 1976. The interchanges between Frisco and Katy amounted to about 5,000 carloads, divided almost equally between the Denison and the Dallas-Fort Worth gateways. Approximately 80 percent of this traffic terminated on Katy. At least 3,556 of of the 5,000 carloads moved wholly within the South-Central States.

Approximately 60 percent of the 3,537 carloads interchanged between MKT and FW&D at Dallas-Fort Worth either originated or terminated on Katy. This data reflects 1976 operations and therefore excludes joint FW&D-Katy unit coal train operations instituted since that year.

No station on Katy originated more than 8,000 carloads annually in 1976. As for terminations, four stations were the destination for 10,000 or more carloads. (This includes Tulsa, which actually was the destination of 9,668 carloads in 1976.) Leading the list of destination stations in 1976 were Houston (48,836 carloads), Dallas (26,656 carloads), and Kansas City (10,951 carloads). Fort Worth, Galveston, and San Antonio, TX, and Pryor, OK, were each the destination for 5,000 to 7,000 carloads in 1976.

From 1973 through 1976, Katy's overall traffic generally has consisted of 14 to 17 percent local, 18 to 23 percent interline originated, 49 to 53 percent interline terminated, and 11 to 13 percent overhead (bridge) movements. Over the same period, annual revenue tonnage has remained in the range of 15 to 16

million tons, while revenue ton-miles have consistently ranged between 4.7 and 6.1 billion.

Overall, Katy's traffic volume and operations over existing lines have changed little since the 1950's.[28]

Three commodity groups have constituted Katy's principal source of freight revenue since 1967—food and kindred products, farm products, and chemicals and allied products. Year-to-year shifts have occurred in the relative revenue contribution of the three groups, apparently due to grain production and export levels. In any event, each of the commodity groups discussed here have normally contributed from 9 to 20 percent of total freight revenue. Since 1973, nonmetallic minerals have played an increasingly important role in Katy's traffic mix, reaching 10 percent of total revenue in 1975 and 1976. However, Katy is clearly dependent on agribusiness traffic.

With respect to equipment, MKT's freight car fleet since 1967 has been comprised mainly of leased cars. In the period 1967-76, the total number of owned and leased cars remained rather stable (11,000 to 13,000 cars) through 1972. In each succeeding year the number decreased, reaching 8,570 cars in 1976. The aggregate capacity of Katy's freight car fleet was 758,000 tons in 1967, increasing to 899,000 in 1968, and declining each year thereafter, to 638,000 tons in 1976.

Changes in the number of Katy's four major car types are shown below:

Car type	Number of cars	
	1967	1976
Box	5,192	4,636
Gondola	1,758	1,279
Open hopper	1,935	795
Covered hopper	1,181	1,473

Katy's position as a protestant

MKT asserts that its gross revenue loss due to diversion of traffic resulting from the merger will be severe. Applicants estimate that Katy's gross revenue loss will be $6.5 million, while Katy estimates

[28] See *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556, 793-797 (1974).

its loss will be $11.5 million. MKT feels that regardless of whether one uses the applicants' or MKT's figures, these diversions will be severe and will necessitate suitable compensation.

Katy asserts that the importance of its role in the national transportation system is demonstrated by the commitment of the United States Government through loans to Katy of $19 million in 1975 and 1976, primarily to effect rehabilitation of the railroad's essential main line. As of January 1979, some $6 million of this loan had been repaid. Katy's importance is further confirmed, it claims, by approval of over $16 million in additional loans in 1977 and 1978 which expressly required that the financing be:

> justified by the present and probable future demand for rail services to be rendered by the applicant and will serve to meet demonstrable needs for rail services and to provide shippers with improved service.

According to MKT, these loans followed the designation of Katy's main line as one of the principal corridors and primary lines in the national transportation system in the "Classification and Designation of Lines of Class I Railroads in the United States" submitted to Congress by DOT. Katy claims that this designation was influenced by the fact that it has the short-line miles between Kansas City and north Texas and serves a large industrial area of considerable economic potential.

Katy serves over 160 cities and towns and directly serves over 1,500 industries, a significant number of which are served only by Katy. Katy claims success in locating not only several large industries but a number of smaller industries dependent on rail service. MKT asserts that many have located on MKT mainly because of its assurance that it would rehabilitate the railroad. Katy asked them for the traffic in sufficient volume to supply the revenue necessary for its rehabilitation projects.

MKT presented the following examples of major industries served only by Katy. There are two large coal-fired powerplants under construction, one by the Lower Colorado River Authority (LCRA) near La Grange, TX, to go on line in 1979. Coal began to move to this plant in the latter part of 1978 using one unit train; another unit train is scheduled to begin operations in June 1980. The second coal facility is the Grand River Dam Authority (GRDA) facility at Pryor, OK, anticipated to be operational in 1981. Each of these powerplants have the claimed potential of using 8 million tons of coal per year as additional units are added with potential capacity of

2,400 megawatts. In 1979, LCRA expected to use approximately 2 million tons of coal in its first unit. During the following year LCRA expects to add a second unit, which would double this amount. The third and fourth LCRA units are expected in the future. Each unit represents 20,000 carloads annually at $516 revenue per car. Much of these deposits lie along Katy's line. GRDA also contemplates up to four units in the future.

Two large ammunition facilities are located at Parsons and near McAlester on Katy's line. These plants, located near the geographic center of the United States, must be served for national defense purposes. A bomb casing plant on Katy's line at Waco, TX, in full production during the Vietnam War, is ready for immediate reopening should it be necessary. This plant too must be served.

Katy feels that the usual protective devices, such as trackage rights and traffic conditions, would not afford it the protection necessary to overcome the losses resulting from this proposed merger. There are no territories or facilities of either of the applicants' lines that Katy feels would help it offset its losses and maintain dependable and reliable service.

Katy feels that because the merger will affect it so severely, it should be reimbursed. For this reason, if the proposed merger is approved, Katy seeks a condition requiring that the merged company indemnify Katy in cash on an annual basis for the financial loss from diverted traffic. With the indemnification condition as outlined, Katy feels it can complete its rehabilitation project on schedule and repay prior obligations. Katy asks that indemnification payments be continued until the year 1997, at which time it will have discharged its Federal loan obligations. Katy feels that the Federal Government, as well as Katy's bondholders and other creditors, are entitled to this protection, as are the shippers and employees who depend on Katy. Katy claims that it seeks only to maintain its present financial position as a viable part of the national transportation system.

As part of the 1975 Katy rehabilitation loan agreement with the United States Railway Association (USRA), Katy's parent, Katy Industries, Inc., must remit to the railroad any tax benefits received from continuing to include the railroad's operations in the parent's consolidated Federal income tax return. Payments received by the railroad under the tax allocation agreement are remitted to USRA to be applied to the unpaid principal installments in the reverse order of maturity.

The Federal loan agreements may be amended with respect to the timetables for repayment. Also, USRA may waive any covenant and impose any reasonable condition on any such waiver. Hence default for failure to perform covenants is expressly conditioned on USRA's consent to such failure. Two defaults have in fact occurred under the two agreements, but have been cured by waivers.

Traffic diversion

Katy's estimated traffic losses to the merged company are analyzed in appendix H. We conclude that Katy stands to lose between $8.6 and $8.9 million in gross revenue.

MKT developed estimated expense reductions by costing the labor or nonlabor service units which would not be performed. A standard application of a 1976 Rail Form A was run for MKT, except that all expense inputs were first taken at their full 1976 reported amount rather than the usual variable percents contained in appendix F of "Rail Carload Cost Scales, 1975." Two categories of accounts were excluded from the run: (1) those accounts where a determination was made that the projected traffic loss would not result in any reduced expenses in 1976 dollar amounts; and (2) those accounts, or portions of accounts, which would be subject to direct special studies and were not included to avoid duplication.

MKT takes the position that the use of a standard Rail Form A application to cost the gain or loss in traffic related to the merger is inappropriate without supporting data to justify the major assumptions built into the formula and its use. Katy maintains that Rail Form A costs fail to provide for losses that will be felt in the short term. Rail Form A also assumes long-term variability of costs occurring at average density on systemwide averages.

Katy states that use of operating ratios is also an inappropriate measure for determining costs because that method assumes that all operating costs would vary proportionately with the particular traffic involved.

Katy believes that its short-term losses will require immediate relief and that merger induced costs will be unevenly distributed over its system. Katy argues for use of incremental costs, which it believes will provide for short-term losses and which present a more factually sound representation of actual operating conditions.

Katy delineated 26 segments of its rail lines which were determined by traffic flow, train operations, and junction points and potential diversions. The expanded annual losses of traffic were

analyzed to determine the average monthly loss of loaded and empty cars by line segment over which such traffic moved in 1976. The estimated losses were separated into grain and other traffic. Complete and partial losses were distinguished—a loss was deemed partial if a particular movement moved over only part of a line segment.

The following table presents MKT's summary of cost reductions. Katy's estimated total expense reduction was $5,455,863, or 47.3 percent of the estimated $11,540,299 total revenue loss.

TABLE 17

Summary of cost reductions—MKT

	Amount
Expenses associated with:	
1. Gross ton-mile	$797,691
2. Locomotive unit-mile	527,627
3. Train-mile: crew	309,982
4. Train-mile: other	41,311
5. Station clerical, carload	39,975
6. TOFC clerical	8,305
7. Station platform, carload	3,284
8. Special service, carload	1,099
9. TOFC tie downs and special service	77,185
10. Train supplies: running	34,694
11. Train supplies: terminal	27,046
12. Loss and damage, carload	101,038
13. Mileage car inspection	13,894
14. TOFC trailers	162,469
15. Car costs: non-MKT	1,540,513
16. Car costs: MKT "demand"	154,331
17. Car costs: MKT "surplus"	12,166
18. Switch engine minutes	577,894
19. Trackage charges	121,333
20. Terminal railroad switching	434,866
21. Locomotive investment	143,530
22. Caboose investment	3,638
23. Yard labor: transportation	196,158
24. Accounting	56,442
25. Yard labor: maintenance	25,555
26. TOFC: pickup and delivery	30,049
27. TOFC: interchange	13,788
28. Total expense reduction	5,455,863
29. Total revenue loss	11,540,299
30. Percent expense to revenue	47.3

Note: The second year, line 21, Locomotive investment, increases to $200,942 based on seven locomotives in lieu of five locomotives.

Impact on shippers and employees

Katy states that the merger would adversely affect its ability to meet government debts.

Katy believes that its customers who do not have convenient access to other rail lines, or for whom Katy is the shortest or best route, would suffer a loss of service and higher costs as a result of Katy having to reduce service in order to avoid default on its loans.

Several Katy shippers[27] state that they depend on and are satisfactorily served by Katy. They fear that the financial strain from diversion caused by the merger would cause Katy to curtail its services. Hence they support Katy's request for indemnification.

Katy's supply of equipment to its customers requires substantial capital investment. With the loss of income expected from the merger, Katy would be forced to curtail its maintenance program, its regular service, or its equipment program in order to meet its financial obligations.

Katy states that its employees will be adversly affected by the proposed merger through reductions in work force or hours of employment to the extent that:

(a) train crews will be reduced by an average of 11 positions per day as a result of a reduction of the number of trains operated;

(b) switch crews will be reduced by an average 13 positions per day, and the number of hours of certain switch crew assignments also will be reduced; and

(c) account clerical positions will be reduced by three. Katy estimates that 65 percent of these reductions will occur in the first year following merger and that they will reach 100 percent in the second year and thereafter, except as mitigated by attrition.

Relief sought by Katy

Indemnification.—MKT seeks indemnification from the merged system for the financial losses expected to result from the diversion of traffic to the merged system. The indemnification formula proposed by Katy is set forth in appendix K.

Under its proposal indemnity would not be paid (1) if BN did not actually divert traffic presently moved by Katy; or (2) should grain and merchandise traffic be diverted, if BN would include Katy in

[27] Verified statements were filed by LCRA; La Barge, Inc., Tubular Division; Breton Corporation; Clareden, Inc.; Denison Area Chamber of Commerce (Texas); and Gifford-Hill & Co.

new traffic which might develop (other than coal shipments destined to LCRA near La Grange, TX, and GRDA near Pryor, OK) and thus compensate Katy by sharing different traffic producing revenue equivalent to that loss due to diversion.

Katy claims it needs protection against the loss of both traffic interchanged with BN and Frisco and traffic not interchanged with the applicants which would be lost nonetheless as a result of the merger. Indemnity would be payable if Katy's annual gross revenue on traffic interchanged with the merged system (excluding traffic destined to LCRA and GRDA, because this coal traffic did not commence until after the base year 1976) is less than the sum of (a) the gross revenue received by Katy in 1976 on such traffic ($13,140,208) and (b) the Commission's one-time estimate of the Katy loss of gross revenues on noninterchanged traffic (estimated at $4,771,000 in the study year). If the Commission makes such a finding, Katy claims, then indemnity would be payable to the extent to which MKT annual gross revenues from traffic interchanged with the merged system fall below $17,911,208, based on 1976 revenues. Because Katy, BN, and Frisco agree that only 65 percent of the estimated losses will be felt in the first year after merger, the amount to be added under clause (b) of the formula should be only 65 percent of the amount the Commission estimates Katy will lose on noninterchanged traffic. The formula also provides for recomputation of 1976 revenues and revenue losses to take into account any general freight rate increases effected thereafter.

The amount of the indemnity would be a percentage of the deficiency in gross revenues determined under the formula. The formula provides for the Commission to determine the percentage of the gross revenue losses that will be savable. The remaining percentage will be the indemnification factor which, when multiplied by the deficiency in Katy's gross revenues resulting from the merger, will determine Katy's net revenue loss. It is this net revenue loss which would be paid to Katy.

Katy argues that prior Commission decisions support its indemnification factor. On reconsideration of the *Penn Central* case,[28] DH demonstrated its out-of-pocket freight ratio to be 49.73 percent, which the Commission concluded required an indemnification factor of 50 percent. The Commission also rejected use of an unadjusted Rail Form A, indicating that its use would be improper unless gross revenue losses substantially exceeded 10 percent.

[28] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 330 I.C.C. 328 (1967).

Modified DT&I conditions.—Katy states that the merged company will enjoy advantages due to its ability to furnish single-line service and single-line rates, its expanded solicitation and marketing forces, and its consolidation of fleets. Absent conditions providing for maintenance of open gateways, joint rates, and routes, the merged company will have absolute power to preclude competing carriers from participating in traffic from and to the Southwest. Also, maintenance of competitive service requires prompt interchange at junctions with competitors on an equal and neutral basis. To insure such equality, Katy believes it is necessary to impose on the merged company the conditions applying to present routes, gateways, schedules, and service, and to all postmerger routes, rates, transit privileges, schedules, and services which extend the merged company's present routes, rates, transit privileges, and schedules beyond junctions where Katy is a connecting carrier.

Katy believes the merged company would publish single-line rates, excluding Katy from participating in traffic now routed BN-Katy or Frisco-Katy. Katy has therefore prepared a list of specific conditions which would require the merged company to keep open present routes, junction points, and rates, and also permit Katy to participate in joint rates with the merged company on the same basis as any of the merged company's single-line rates in existence now and in the future. To insure neutrality with respect to service, especially prompt interchange at junction points, Katy proposes essentially the same conditions as imposed by the Commission in previous merger proceedings. The requested conditions are listed in appendix K.

Applicants' response to Katy

BN and Frisco point out that traffic diversion, where brought about by improved service to the shipping public is in the public interest and is not a valid reason for denial of a merger. Applicants also argue that Katy's continued viability will not be impaired by the merger because: (1) the merger will not realistically be consummated before late 1980 at the earliest, allowing MKT to meet its loan obligations for 1979 and 1980 while continuing its rehabilitation program; (2) Katy will remain viable and able to meet its debt obligations in the first full postmerger year because only 65 percent of the diversion will occur, not the full 100 percent projected by Katy; and (3) MKT's financial position in the 1980's will

improve because of (a) new coal traffic to LCRA and GRDA generating facilities, local on MKT, which will require at least 60,000 carloads of coal annually and generate $26,840,000 in gross revenue, (b) major increased chemical and crushed stone traffic, and (c) completion of Katy's rehabilitation program in 1982, significantly reducing expenses to the much lower normal cycle maintenance expenses.

Applicants argue that Katy's proposed indemnification formula is overly broad in scope, inflexible, unfair, impossible to administer, and anticompetitive. They point out that there is no definition of probable annual loss, savable costs, and indemnification factor; therefore, the true impact of the condition cannot be assessed. Also, the formula excludes Katy's future profitable traffic and reduction in rehabilitation expenditures. This, it is argued, presents a skewed picture of Katy's ability to provide service. Applicants do not believe the benefits of the merger should be reduced by an indemnity provision.

Among the practical obstacles they see in Katy's indemnity formula are: (1) the failure to take into account a comparable decline in merged BN revenue; (2) a lack of consideration of growth in coal traffic; (3) the duration for 20 years; (4) loss of incentive for MKT to compete for traffic; and (5) the further Balkanization of the railroad industry.

Illinois Central Gulf Railroad Company

Summary of ICG position

ICG opposes the merger unless certain conditions are imposed for its protection. ICG argues that the merger, if approved, should be conditioned on a grant of trackage rights between Memphis and Birmingham. Such a grant would offset the adverse impact of the merger, would reduce ICG's route between these points by 153 miles; would reduce transit time by 13 hours eastbound and 36 hours westbound; would not permit ICG to serve new points or industries as a result; and would not impair current users' handling of their own traffic. To connect its track with Frisco, ICG also requests terminal operations over Mopac in Memphis.

As another condition to approval of the merger, ICG requests that the Commission modify terms of a joint terminal agreement covering operations as East Thomas Yard in Birmingham to end discrimination against ICG traffic.

ICG requests that modified DT&I conditions be imposed to better protect nonmerging railroads from traffic losses that would otherwise occur as a result of merger. This includes a condition for keeping the Centralia gateway open.

Scope of operations

ICG operates 8,877 miles of road in Alabama, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, South Dakota, Tennessee, and Wisconsin. With three major exceptions, the ICG system is composed of north-south lines, extending from Chicago, IL, to Birmingham, Montgomery, and Mobile, AL, and Baton Rouge and New Orleans, LA. The exceptions are the routes between (1) Chicago and Omaha-Council Bluffs, (2) St. Louis (also Chicago) and Kansas City, and (3) Shreveport, LA, and Meridian, MS. The north-south routes are geographically divided between a northern region and a southern region. For the northern region, several parallel routes extend from Chicago to Fulton, KY, where they converge and where several other parallel routes fan out southward through the southern region to gulf coast points.

The heaviest density route on ICG is between Chicago and New Orleans over the following route segments (data are for 1976):

Route segment	Millions of gross tons per mile
1. Chicago-Edgewood, IL	38 to 44
2. Edgewood-Fulton:	
via Centralia, IL	22 to 49
via Bluford, IL	12 to 23
3. Fulton-Memphis	40
4. Memphis-Jackson, MS	28
5. Jackson, MS-New Orleans	25

In the northern region, several routes in 1976 had traffic densities of 5 to 15 million gross tons per mile of road: (1) Chicago-Omaha; (2) Chicago-St. Louis-Kansas City; (3) St. Louis-DuQuoin, IL (on the Chicago-Centralia-New Orleans route); and (4) Fulton-Louisville, KY. Similar traffic densities in the southern region existed on the Shreveport-Meridian, Fulton-Birmingham, Fulton-Meridian, and Baton Route-New Orleans routes.

The principal points of interchange between ICG and BN are at Chicago, Peoria, Centralia, St. Louis-East St. Louis, Council Bluffs,

and Kansas City. Major ICG interchanges with Frisco occur at St. Louis-East St. Louis, Kansas City, and Memphis. (ICG and Frisco also interchanged less than 500 carloads at Birmingham and Mobile in 1976.) Other major pertinent ICG gateways are Corinth, Meridian, Hattiesburg, and Gulfport, MS, Jackson, TN, Monroe and New Orleans, LA, Louisville, and Montgomery.

Chicago is ICG's largest volume gateway (274,208 carloads in 1976). ICG interchanged 6,052 carloads with BN at Chicago in 1976, of which 2,821 originated on ICG and another 2,836 terminated on ICG. Among western district carriers, ICG's interchange volumes with CNW, Soo Line, and Milwaukee Road were the largest (22,196, 20,700, and 11,893 carloads, respectively). All other interchanges with western district carriers amounted to less than 3,500 carloads each. The bulk of ICG's Chicago interchange moved in connection with eastern district carriers.

At Council Bluffs, 3,464 carloads were interchanged with BN. ICG's most important connection at Council Bluffs is UP, with which 37,901 carloads were interchanged. Over 25,000 carloads of the UP traffic were bridge movements over ICG.

At the St. Louis-East St. Louis gateway 7,178 carloads were interchanged with BN and 12,871 carloads were interchanged with Frisco. Of the BN carloads, over 6,000 originated on ICG. Some 5,300 of the total carloads interchanged with BN originated in Illinois and terminated in Missouri. Of the 12,871 carloads interchanged with Frisco, over half were bridge movements for ICG. Over 8,000 carloads interchanged at the St. Louis gateway with Frisco moved between the Northeast and the South-Central States.

ICG's most important interchange with BN is at Centralia, IL. In 1976, the volume of traffic interchanged between ICG and BN amounted to 16,529 carloads, based on ICG data. Of this amount, 14,578 carloads either originated or terminated on ICG. The flow of traffic through the Centralia gateway between ICG and BN is widely dispersed among pairs of regions.

Of the 14,223 carloads interchanged between ICG and connecting carriers at Peoria, only 1,508 were interchanged with BN. Over half of this traffic moved between the northeast and the north-central regions. Approximately half of the carloads interchanged by ICG at Peoria were with Rock Island.

At Kansas City, ICG interchanged 49,276 carloads in 1976, of which over 32,000 were with Santa Fe and UP. ICG interchanges with BN and Frisco amounted to 2,457 and 1,153 carloads, respectively.

South of Fulton, KY, ICG had only one large-volume interchange point with Frisco in 1976, Memphis, where 16,537 carloads were interchanged between the two carriers. Over 15,000 of these carloads either originated or terminated on ICG. ICG's total Memphis interchange amounted to nearly 83,000 carloads. ICG interchanged 7,712 carloads with L&N and 9,435 with Southern at Memphis. The balance of the Memphis traffic (over 49,000 carloads) was interchanged with carriers operating west of the Mississippi River (Mopac, Rock Island, and Cotton Belt).

ICG's largest interchanges in the southern region are with: (1) Family Lines (New Orleans, Birmingham, Jackson, TN, Gulfport, Montgomery, and Mobile); (2) Southern (New Orleans, Birmingham, Corinth, Hattiesburg, and Meridian); and (3) the SP-Cotton Belt system, Mopac, and the KCS-L&A system (at various points in Louisiana). Two short line railroads are also major connections—Meridian & Bigbee Railroad Company (MBRR) at Meridian, MS (22,670 carloads in 1976), and Arkansas & Louisiana Missouri Railway Company (ALM) at Monroe (12,881 carloads).

ICG submitted freight traffic data in its trackage rights application reflecting operations not only for itself but also its predecessor companies. The first full year of merged ICG operations was 1972, and the application data extends through 1977. The following table summarizes the traffic data for the 1972-77 period:

TABLE 18

ICG freight traffic, 1972-77

Year	Carloads	Tonnage	Revenue ton-miles	Gross freight revenue
	Millions		*Billions*	*Millions*
1972	2.0	112.0	30.7	$472.2
1973	2.0	102.5	34.1	512.0
1974	1.9	105.8	32.1	567.7
1975	1.6	91.2	26.8	541.4
1976	1.6	95.2	28.9	605.8
1977	1.6	95.3	30.2	652.1

Following its merger, ICG's traffic volume declined quite sharply through the recession year 1975. Recovery, except for gross freight revenue, has been slow. It is reasonable to conclude that these

revenues increases are largely attributable to general rate increases. During the period, ICG's traffic was comprised of approximately one-third local, one-third interline originated, one-fourth interline terminated, and the balance overhead movements. The five principal revenue-producing commodities handled were: chemical or allied products (14 to 17 percent of total gross freight revenue); food or kindred products (11 to 13 percent); coal (10 to 13 percent); farm products (9 to 11 percent); and lumber or wood products, except furniture (9 to 10 percent). Coal has represented approximately 25 to 28 percent of ICG's total tonnage annually.

In 1976, 19 ICG stations originated 10,000 or more revenue carloads. The top five points of origination are: Chicago (49,033 carloads); Memphis (40,285); Percy, IL (32,482); Vogue, KY (30,898); and Geismar, LA (24,223). Of the remaining 14 stations, most are located in Illinois and Kentucky.

Also in 1976, there were 21 stations at which 10,000 or more revenue carloads were terminated. The top five stations in this category are: Chicago (61,926 carloads); New Orleans (43,643); Jackson, MS (38,494); East St. Louis (37,283); and Chiles, KY (34,513).

Impacts of merger

ICG rejects applicants' estimates of diversion from ICG ($6.6 million). ICG argues that its diversion studies and results are more accurate because it used a larger sampling pool (1.5 percent); it included traffic not handled by applicants; and it used incremental costs instead of Rail Form A variable costs. In support of its use of incremental costs ICG notes that its financial situation requires evaluation of the proposed merger's impact on a short-term basis, rather than on a long-term basis, and requires evaluation of the merger based on changes directly related to the merger, rather than hypothetical changes in plant and operations.

ICG alleges gross revenue losses of $8,672,901. ICG estimates that the costs which could be avoided through the loss of the diverted traffic would total $3,812,659, resulting in a net revenue loss of $4,860,242 annually by the third year.

TABLE 19

ICG estimates of losses to a merged BN-Frisco

Item	Year		
	One	Two	Three
Revenue diversion	$4,336,451	$7,805,611	$8,672,901
Expense savings:			
Time mileage	653,074	1,175,533	1,306,148
Switching	216,823	390,281	433,645
Gross ton-mile	945,669	1,702,204	1,891,338
Freight car	90,764	163,375	181,528
Total savings	1,906,330	3,431,393	3,812,659
Diversion loss (net)	2,430,121	4,374,218	4,860,242

This data reflects ICG's belief that 50 percent of the diversion will take place in year one, 90 percent in year two, and 100 percent in year three.

ICG states that it can ill afford traffic diversions of this magnitude. For many years its resources have been inadequate to prevent deterioration of its plant and equipment. Deferred maintenance of road and equipment totaled over $187 million as of June 30, 1974, and delayed capital expenditures on the same date were over $258 million. According to ICG, these deferrals are heavily concentrated on essential main lines.

DOT classified the lines of class I railroads by their degree of essentiality, with "A main line" as the highest classification. ICG states that 1,157 route miles of its system met this standard,[29] including almost the entire line between Chicago and New Orleans, for which ICG has recently received Federal rehabilitation funding. Of $107,870,000 in authorized funding, 94.55 percent is for the correction of deferred maintenance and only 5.45 percent for ordinary maintenance or for improvements beyond the correction of deferrals.

[29] The route mileages of ICG's "A main lines" are:

Chicago (Markham Yard) New Orleans via Carbondale, IL, and Gwin, MS	890
Edgewood, IL-Metropolis, IL	123
Paducah, KY-Central City, KY	100
Baton Rouge, LA-Hammond, LA	44
Total	1,157

ICG states that for a railroad in its physical condition incremental dollars are extremely important because the cost of failing to perform maintenance rises sharply with the level of deferrals. ICG determined that one of the prime economic benefits of its rehabilitation program would be reduced maintenance-of-way expense per car-mile. Losses of revenue will increase the real cost in wear and tear on the railroad facilities, even if lack of maintenance funds were to prevent this cost from appearing in the railroad's near-term financial statements. According to ICG, its financial condition does not permit replacement of this vitally needed cash from other sources. The railroad has closed each of the years 1975, 1976, and 1977 with negative working capital.

ICG notes that its net income fell from $37,608,000 in 1973 to $3,339,000 in 1977. Transportation income before Federal income taxes dropped from $33,052,000 in 1973 to a negative $27,079,000 in 1977. Most of the $30,418,000 in pretax real estate income in 1977 consisted of capital gains from the sale of ICG nonoperating property, which is a nonrenewable resource.

In addition, ICG claims that the normal capital markets are of very limited value in meeting its need for rehabilitation funding. ICG's fixed charge coverage before Federal income taxes has declined from 3.51 at the close of 1973 to 1.16 at yearend 1977, and, as ICG points out, would have been far less than 1.00 in recent years but for substantial real estate income. Further, even if fixed charges coverage were better, mortgage restrictions would hinder conventional external financing. ICG's return on investment in transportation property was 0.1 percent in 1977.

ICG states that the merger will have an adverse effect on its employees. The impact cannot be precisely defined, however, because the railroad's budget reflects the composite effects of numerous variables, besides the proposed merger, which affect real losses and budget reductions which, in turn, affect employees' positions. ICG states, however, that a significant portion of the reduction in ICG revenues following merger will have to be absorbed through reductions in labor costs.

ICG estimates that the only labor expense which might vary with the volume of traffic would be about 1 cent per car-mile (including fringes) for maintenance of equipment forces, or a third year labor expense savings of about $150,000. It is anticipated that this $150,000 reduction would be reflected in reduced overtime.

Protective conditions

Trackage rights.—ICG requests trackage rights over the merged company between Memphis and Jasper, AL. ICG also seeks to conduct operations over Mopac in Memphis to connect its line with Frisco. ICG operates over Frisco tracks between Jasper and Birmingham. With these trackage rights and the ones sought, ICG would have a direct route between Memphis and Birmingham.

ICG contends that approval of its proposed trackage rights condition would yield a $2.1 million gain, all but $0.6 million of which would result from increased efficiencies, rather than from diversion of traffic from a merged BN-Frisco. The cash retained from this revenue gain would be used for internal purposes, and not for dividend payments in the foreseeable future. (Dividends have not been paid since January 1975.) ICG believes that the revenues resulting from the proposed condition would enable it to retain employees who would otherwise be dismissed or displaced.

Presently, ICG traffic between Memphis and Birmingham moves via Fulton, KY, and Iselin (Jackson), TN, a distance of 405 miles. The proposed trackage rights covers a distance of approximately 210 miles, which, together with the existing trackage rights between Jasper and Birmingham, would create a route 153 miles shorter than the Fulton route. Shifting traffic to the new route would permit the reduction of one daily yard engine shift at Jackson.

The trackage rights sought would include the right to pickup and setout cars at Tupelo, MS. The existing scheduled time for ICG movements between Memphis and Birmingham via Fulton is 23 hours and 15 minutes. ICG believes that the trackage rights would permit schedules of approximately 11 hours, the maximum time needed for certain trains to pickup and setout cars at Tupelo and to change crews at Amory, MS. This would involve 14 trains per week. Some trains would not stop at Tupelo and would cover the Memphis-Birmingham route in 9.5 hours, including the Amory crew change. This train would operate three round trips per week in year one, four in year two, and five in year three. At the end of year three ICG would be operating 24 trains per week between Memphis and Birmingham.

ICG does not believe that operation over Frisco between Memphis and Birmingham would permit the retirement of diesel locomotives or cabooses, but the operation would result in savings through a reduction in train-miles, fuel, and away-from-home terminal lodging and meal allowance expenses.

ICG claims that its infrequent train service, when intermingled with the trains the BN-Frisco proposes to operate, should not unduly delay or inconvenience the merged company's operations. Setting out or picking up cars at Tupelo would not require construction of additional tracks.

ICG asserts that it will not be able to obtain its maximum benefit from the proposed trackage rights unless the Commission mandates specific terms and conditions to ensure that ICG's trains are given equal rights with trains of the merged company. Further, ICG believes that the Commission should direct the merged company not to impede ICG's use of the trackage rights in an effort to enhance the merged company's own competitive position.

ICG prepared a traffic study to determine the traffic gains which would result from the proposal. ICG's estimate of a $4,017,967 gain from the trackage rights condition would offset its estimated traffic loss ($8,672,901) by about 46 percent.

To determine the net revenue gain resulting from the proposed trackage rights, ICG conducted a study of the net cost changes involved. This study was designed to ascertain the cost reductions experienced by reduced usage of the present Memphis-Fulton-Birmingham route and the new expenses attributable to the trackage rights over Frisco's shorter Memphis-Birmingham route.

Based on its traffic studies and proposed operations over a merged BN-Frisco between Memphis and Birmingham, ICG produced estimates of the impact on employees and the costs associated with predicted employment changes. These estimates cover the first 3 years of the proposed operation. The estimates impacts, would occur only at Memphis and Jackson, TN, and Haleyville, AL.

All positions to be abolished would be eliminated in the first year of operation under ICG's plan. A total of 36 positions would be abolished. Shown by location, they are:

Memphis.—Two road engineers, two road conductors, and four road brakemen;
Jackson, TN.—Two road and one yard engineer, two road conductors, four road brakemen, one yard foreman, and two yard helpers; and
Haleyville.—Four road engineers, four road conductors, and eight road brakemen.

These position losses would be partially offset by new positions to be created at Memphis. In year one following consummation, ICG proposes to create positions for 6 road engineers, 6 road conductors, and 12 road brakemen. In year two, two more road brakeman positions would be added, and in year three the number of road engineer, road conductor, and road brakeman positions would each

be increased by one position. Thus, in the third year of operation, ICG prooses a total of 29 new positions at Memphis. The net overall loss would be seven positions. The cost change estimates related to changes in employee positions are summarized in the table below.

TABLE 20

ICG estimated labor costs and savings

	Year		
	One	Two	Three
Wages saved:			
(1) From position abolishments and other	$836,145	$836,145	$924,920
Wages added:			
(2) From position creations	561,434	617,577	673,720
(3) Net wages saved (line 1 - line 2)	274,711	218,568	251,200
Fringes:			
(4) Fringes saved	267,734	267,734	289,218
(5) Fringes added	179,772	197,748	215,725
(6) Net fringes saved (line 4 - line 5)	87,962	69,986	73,493
(7) Total savings, wages and fringes (line 3 + line 6)	362,673	288,554	324,693
Protection costs:			
(8) Surplus employees	196,916	162,892	178,718
(9) Fringes for surplus employees	63,053	52,158	51,878
(10) Displacement costs	53,724	53,724	58,853
(11) Transfer costs	0	0	0
(12) Total protection costs	313,693	268,774	289,449
Net savings (line 7 - line 12)	48,980	19,780	35,244

Frisco does not own about 2 miles of the track in Memphis over which ICG is seeking trackage rights. A 1965 agreement with Mopac has given Frisco trackage rights over that section of track. The agreement provides that Mopac shall not use the track except in emergency; Mopac may use for switch movements that portion of track required for ingress and egress to or from its sidings and connections to serve industries south of Broadway; and operations over the trackage shall be under the direction of Frisco.

ICG considers the track to be Frisco's since Frisco operates over it and directs the use of the track. ICG argues that the Commission has jurisdiction to condition the proposed merger on the grant of trackage rights over the segment (even though it is actually owned

by Mopac) since 49 U.S.C. 11343(a)(6) provides for trackage rights over a line "owned or operated" by another railroad company. Nevertheless, ICG filed an application on May 11, 1979, under 49 U.S.C. 11103, for use of terminal facilities over the track. The track is a necessary link because it connects ICG's Johnston Yard in Memphis to K. C. Junction, where Frisco's track ownership begins.

Mopac has not opposed ICG's applications to operate over the track. ICG maintains that its use of the track will not substantially impair the owner and/or user from handling their own traffic. In fact, ICG now uses the segment between Johnston Yard and K. C. Junction in making interchange deliveries to Frisco in Memphis.

The Mopac track is maintained by Frisco. Frisco pays no cash for its use. (Instead Mopac has use of a Frisco track.) ICG believes that any compensation it would owe for use of the track should be paid to Frisco.

The applicants oppose the trackage rights condition on numerous grounds. Applicants contend that there are sufficient carriers serving the Memphis-Birmingham corridor already. They point out that Frisco and Southern perform direct service, while ICG and L&N perform service over a more indirect route. ICG service over its indirect route has deteriorated and now takes 23 1/4 hours from Memphis to Birmingham, compared to 17 hours in 1971. ICG gave up a trackage rights agreement with Southern that provided a direct route because of a lack of business.

BN and Frisco also argue that the proposed trackage rights are not related to their proposed merger. They point out that little harm will befall ICG at the Birmingham and Memphis gateways, and that the market will not be affected by the merger.

The applicants also argue that ICG use of Frisco's track would create inefficient service and add 2,519,562 loaded car-miles to the total routing. BN and Frisco contend that ICG will use circuitous routing for 12,200 out of the 15,267 cars it intends to move over the line each year, resulting in a major waste of fuel. They give two examples of traffic which ICG would route inefficiently. The first is traffic moving from Geismar, LA, to Demopolis, AL, which currently travels 445.7 miles (284.0 over ICG and 161.7 over Southern). Rerouting this traffic via Memphis will increase the mileage to 877.3 (635.9 miles over ICG and 241.4 miles over BN) with BN having to backhaul the traffic 122.5 miles. Although ICG's mileage on this movement will increase by 351.9 miles, its revenues will only increase by $101.84.

The other example is a movement from Geismar to Ryster, FL, of 774.4 miles (68.0 over ICG and 709.4 over SCL-L&N). Utilizing the trackage rights between Memphis and Birmingham, the total route mileage will increase to 1,301.5 (635.9 over ICG and 665.6 over SCL). With this increased mileage, ICG revenue will increase by only $144.79.

BN and Frisco next state that the operations proposed by ICG will not be profitable. They argue that increased revenue will be $4,017,967, decreased expenses will be $1,474,258, and increased cost will be $6,287,000, for a net loss of $794,775.

Another argument is that the proposed trackage rights are not operationally feasible and will cause congestion over the Memphis-Birmingham line, interfering with existing and proposed service to shippers. BN indicates that ICG did not study: the cost of using four GP locomotives instead of three SD locomotives; the reduction in revenue for not providing service at Holly Springs and New Albany; the cost for a crew change at Amory, MS; and the transit time between Memphis and Birmingham.

BN also points out that there will be added congestion (1) between Broadway and Tennessee Yard in Memphis, where there are currently 36 trains per day and ICG intends to add two more, and (2) in the Tennessee Yard itself, due to 24 additional trains per week from ICG which will overburden the yard, which currently uses 40 blocks per day to make 25 Frisco trains per day.

The physical operation will also present certain problems. The line is single track with centralized traffic control. Additional trains will cause capacity problems because there are only nine sidings between Tennessee Yard and Amory, and seven between Amory and Jasper. These are currently needed for Frisco. The applicants contend that the current configuration of this line cannot handle the 14 new trains per week proposed by BN and the 24 new trains per week proposed by ICG. Additionally, applicants point out that pickups and setouts at Tupelo, MS would block the main track while ICG was performing switching, adding to congestion.

Finally, applicants point out that ICG has obtained no shipper support for its proposed trackage rights. Applicants theorize that the lack of shipper support stems from the circuity ICG will use to route traffic.

Applicants argue that the trackage rights sought by ICG is an indirect indemnification. They point out that the 4 cents per car-mile payment is only sufficient to cover variable cost. They point

out that if ICG were to pay the full cost of the line that ICG's losses in providing service over the line would be much greater. BN contends that the gross revenue loss to ICG of only 1 percent is insufficient to require indemnity.

ICG disputes all of applicants' arguments. ICG's basic premise for obtaining trackage rights is its need to offset losses from the merger. It points out that over 19,491,379 car-miles of traffic were handled by it between Memphis and Birmingham in 1976. The trackage rights will shorten its route by 153 miles. ICG also states that applicant's calculation of the time in transit over the line (17 hours 11 minutes) is inaccurate because they fail to subtract 1 hour 30 minutes from the elimination of pickups and setouts at Holly Springs and New Albany, 1 hour 30 minutes of terminal time at origin, and 30 minutes of terminal time at destination. ICG also points out that its former trackage rights over Southern were circuitous.

In answer to applicants' contention that the routing by ICG could be circuitous ICG merely states that if the shippers do not care to use a circuitous route the traffic will not be shipped that way.

ICG also states 7,253,801 car-miles would be saved, and that applicants' calculation is in error because they fail to consider the miles saved on rerouted traffic that would no longer have to travel from Memphis to Fulton, and then to Birmingham. ICG points out that the same is true of the revenue they expect to obtain from the service. They state that they will have net income of $1,877,106 from the line, since the $6,287,000 of expenses already includes the cost of current operations. ICG also states that it studied the revenues and cost of eliminating service at Holly Springs and New Albany. ICG further states that it has not determined whether or not four GP locomotives will be used in lieu of the three SD locomotives on which the cost study was based. ICG points out that although there is a 12 degree 30-minute curve at Tupelo, MS, Mopac and Cotton Belt used SD locomotives on greater curves in Memphis.

ICG also states that expenses were averaged on a gross ton-mile basis and that it will save crew costs because there will be only one change at Amory, MS instead of the three crew changes currently at Fulton, KY, Jackson, TN, and Haleyville, AL.

Terminal operations.—ICG requests the right to serve all the sidings, tracks, and facilities in the Birmingham terminal area with its own engines and crews.

ICG has an agreement with Frisco covering the operation of the joint East Thomas Yard at Birmingham. Frisco provides the

transportation management, yardmen, enginemen, train yard car inspectors, and yard clerical personnel.

ICG owns and maintains 54.1 percent of the trackage in East Thomas Yard, and Frisco owns the remainder. ICG states that during 1977, Frisco accounted for 69.4 percent of the traffic moved through East Thomas Yard, and that the merged company proposes to increase its proportionate use of East Thomas Yard. ICG's traffic between Birmingham and Memphis presently moves on several connecting trains.

With respect to the Birmingham terminal operations, ICG alleges that Frisco has not been fully cooperative in classifying ICG traffic for movement to Memphis. As a result, ICG contends, the traffic must be accumulated at Jackson, TN, and moved once a day to Memphis.

BN and Frisco take the position that the dispute in the Birmingham terminal area is contractual in nature and should be resolved through negotiations between the parties.

Modified DT&I conditions.—ICG also urges the Commission to impose the DT&I conditions, plus a number of additional gateway and routing conditions. Asserting that the standard DT&I conditions are inadequate, ICG proposes the six conditions set forth in appendix K.

ICG states that the conditions it proposes here would not guarantee that there would be no traffic diversion, and that it is not ICG's purpose to impose an unreasonable burden upon a merged BN-Frisco. Its principal purpose is to spell out the obligations of a merged BN-Frisco to maintain routes and services in the same manner as those to be maintained with other connecting carriers.

ICG insists that the proposed conditions be made applicable not only to the merged company but also to its subsidiaries.

ICG also wants the standard DT&I conditions amplified to spell out specifically that they apply on all classes of traffic regardless of whether shipments move on class, commodity, or other types of rates, and regardless of equipment used.

Similarly, ICG urges the Commission to adopt language to provide specific application of the traffic conditions to traffic generated by industries which may locate on the lines of the merged company in the future and to new movements which may develop.

ICG asks the Commission to require the merged company to establish, on written request, joint routes and rates and fair and reasonable divisions on traffic. ICG shall designate at the same level maintained by the merged company via competitive routes. In ICG's

view, this would enable it as a connecting carrier to maintain joint rates with the merged company competitive with rates the merged company maintains from, to, between or via points ICG reaches, as well as competitive with rates the merged company maintains with competitors of ICG.

ICG disclaims any intention to inundate the merged company with requests for joint rates via obscure or unworkable junctions. Consideration of service and profitability will preclude any such action. ICG admits, however, that the language it proposes would allow it to ignore such considerations.

ICG requests a condition requiring the coordinated service interchange arrangements between BN and ICG at Centralia, IL, to be maintained unless cancellation is agreed to by ICG. Operations covered by the present agreement save 24 hours in transit time on traffic between the northwest and north-central regions and the southeast and south-central regions.

Applicants are not opposed to a condition that would ensure premerger quality of service over the Centralia gateway as long as shippers can be offered the benefits of the merger. They would continue the present traffic and operating relationship with ICG, "so long as warranted by traffic volume and provided the ICG also maintains present levels of train service to and from Centralia."

The agreement would apply only to traffic where the shipper has specified on the bill of lading a BN junction with ICG. A Frisco junction is not included.

ICG argues that a routing agreement is necessary to the Centralia gateway condition or the quality of service over the Centralia gateway will be lost, since little traffic would move via Centralia if the merged company did not attempt to route traffic that way.

BN argues that ICG's gateway and routing conditions could require routes and rates for inefficient and impractial routings. These conditions could handicap the feasibility of unit-train operations.

Finally, ICG requests the Commission to prescribe for its benefit such gateway, routing or traffic conditions prescribed for the benefit of other protesting railroads, in addition to the standard DT&I conditions and the additional conditions discussed in its statement.

Soo Line Railroad Company

Summary of Soo Line's position

Soo Line argues that the applicants are both financially strong railroads and that a merger is not required. It asserts that a merged

BN-Frisco would divert substantial amounts of Soo Line traffic moving between Chicago and the Twin Cities and Duluth-Superior. Soo Line feels the merger, if approved, will allow two large, prosperous railroads with extensive resources to expand their economic influence at the expense of other railroads. If the merger is approved Soo Line seeks imposition of nine specific conditions set forth in appendix K. These conditions are necessary, according to Soo Line, to preserve its ability to render efficient transportation service to its present shippers and receivers.

Scope of operations

Soo Line (of which Canadian Pacific Railway (CP) owns 55.7 percent) operates approximately 4,600 miles of railroad in Montana, North and South Dakota, Minnesota, Michigan, Wisconsin, and Illinois. Its principal interchange points with BN are Chicago, Duluth-Superior, the Twin Cities, Detroit Lakes, Thief River Falls, and Glenwood, MN, and Bismarck, Valley City, and Minot, ND. Soo Line does not connect directly with Frisco, but participates in joint through routes and rates covering traffic moving to, from, and via Frisco.

Minneapolis-St. Paul is approximately the east-west center of Soo Line's system. In the western region, the principal main lines extend from Portal, ND, and Noyes, MN, both important interchange points with CP on the Canadian border, to Minneapolis via Glenwood, MN. At Noyes, Soo Line also interchanges with Canadian National Railways (CN) and a CN subsidiary which extends to Winnipeg. Traffic densities in gross tons per mile (GTM) on these lines in 1977 were as follows:

Portal-Glenwood	5 to 9 million GTM
Noyes-Glenwood	9 to 10 million GTM
Glenwood-Twin Cities	17 to 18 million GTM

Principal commodities handled by the Portal (predominantly southbound and eastbound) line are grain, agricultural implements, lignite, manufactured products, fertilizer, lumber, woodpulp, lead and zinc, sulphur, potash, and other mineral products. The same products are handled, also mostly southbound and and eastbound, over the Noyes line, which also handles potatoes and newsprint. The remaining lines in North Dakota, South Dakota, and Montana are feeder lines which handle cereal and feed grains. Western North

Dakota has substantial lignite coal deposits and several coal mines which ship coal via Soo Line to electric powerplants and sugar beet refineries. Lines between Thief River Falls, MN, Superior, WI, and between Brooten, MN, and Superior are used principally for the movement of western grain to terminal elevators at Duluth and Superior, for storage, export, and reshipment. Export grain also moves via Soo Line to Gulf of Mexico and west coast ports. Soo Line's routes in the grain growing areas of Montana, North Dakota, South Dakota, and western Minnesota and its main lines to primary markets provide rail service to farmers, millers, elevator operators, and grain merchants of the upper midwest.

Soo Line's rail facilities east of the Twin Cities and Twin Ports (Duluth-Superior) serve primarily industrial regions. The Twin Ports have large terminal grain elevators and lake shipping facilities and are an interchange point between Soo Line and the Duluth, Winnipeg & Pacific Railway Company (DW&P), a part of the CN system.

In the Upper Peninsula of Michigan, Soo Line serves the copper industry located near White Pine, MI, and forests producing pulpwood moving to paper plants located near Escanaba, MI, and in the Fox and Wisconsin River Valley regions in Wisconsin. The line, extending from Saulte Ste. Marie, MI, through Argonne Junction and Neenah, WI, to Chicago, handles pulpwood, woodpulp, paper and paper products, lumber and mineral products, and steel originating in northern Ontario and eastern Canada. The Saulte Ste. Marie-Neenah segment handled 3 to 4 million GTM in 1977.

The principal line in Wisconsin is the main line between the Twin Cities and Chicago via Chippewa Falls, Marshfield, Stevens Point, Neenah, Oshkosh, Fond du Lac, Waukesha, and Burlington. Traffic density in 1977 over this line ranged from 11 to 21 million GTM. Secondary lines run from Superior to the main line at Owen, from Ashland to a point on the main line at Spencer, and from the Twin Cities across the State through Ladysmith and Rhinelander, WI, and Gladstone and Manistique, MI, to Saulte Ste. Marie, for interchange with CP. The three secondary lines handled 5 million GTM or less in 1977.

Soo Line handles pulpwood, woodpulp, kaolin clay, soda, sulphur, sulphur compounds, and chlorine to Wisconsin papermills and handles their paper products.

There are several lumber and wood product mills in Wisconsin relying on Soo Line for transportation of saw logs and for shipment of their finished products. Each of four commodity groups—farm

products; lumber and wood products; pulp, paper and allied products; and chemicals and allied products—systemwide produced over 10 percent of the carrier's gross freight revenue.

Soo Line also has operating rights over Milwaukee Road from Rugby Junction to the city of Milwaukee. In that city, all terminal services are provided for Soo Line by Milwaukee Road as its agent or by CNW as a terminal switching carrier.

The principal cities in Wisconsin which have industries relying upon Soo Line for rail transportation are Superior, Chippewa Falls, Eau Claire, Ashland, Marshfield, Stevens Point, Wisconsin Rapids, Biron, Rhinelander, Fond du Lac, Neenah, Menasha, Manitowoc, Appleton, Oshkosh, Milwaukee, Waukesha, Burlington, and Green Bay.

Soo Line maintains a large terminal at Schiller Park, IL, 18 miles from downtown Chicago, and interchanges traffic with all other Chicago railroads.

In 1976, Soo Line empolyed an average of 4,590 employees. Approximately 400,000 carloads of freight were handled, and Soo Line earned $189.3 million in railway revenue. Together with its subsidiaries, Soo Line produced a 1976 net income of $16.2 million.

Traffic diversion

Soo Line fears that a merged BN-Frisco would divert substantial amounts of its traffic moving between Chicago and the Twin Cities and Duluth-Superior. Soo Line believes it will lose $1.3 million (1976 dollars) in gross revenue to the merged company. This would result from an estimated loss of 3,935 carloads of traffic. Soo Line contends that the diverted traffic would reduce handling expenses by $468,077, and that the resultant reduction in net income before Federal income taxes would be approximately $813,202 per year. Soo Line states that it and its shippers cannot afford losses of this magnitude.

Soo Line argues that the proposed merger is not necessary for the survival or even the prosperity of BN or Frisco and is being sought only to divert revenues from other railroads. Soo Line contends that the merger would be contrary to the public interest since it would allow two large, relatively prosperous carriers with vast resources to expand their already considerable economic influence at the expense of other railroads.

Soo Line believes its existing competitive relationships with BN and Frisco would be upset by the merger. Soo Line contends that

BN is its strongest competitor financially and the largest physically which respect to much of its traffic, including: (1) grain from competitive origins in western Minnesota and North Dakota moving to the Twin Cities and Twin Ports; (2) local movements of numerous commodities moving between the Twin Cities, on the one hand, and the Twin Ports and Chicago on the other; (3) transcontinental traffic such as lumber moving from the Pacific Northwest to points beyond the Twin Cities and Chicago gateways; and (4) much international traffic moving from western and west-central Canadian origins to points throughout the Eastern, Southeastern, and Southwestern United States.

The principal Soo Line interchanges with CP are at Noyes, Portal, and Saulte Ste. Marie. In 1976, approximately 25.7 percent of Soo Line's total carloads were interchanged with CP at the western gateways.

CP and Soo Line are parties to a traffic agreement providing generally that, subject to termination provisions, both carriers will continue to maintain routes over which joint through rates or fares were in effect on November 1, 1940.[30]

Soo Line points out that its most vigorous competition involves traffic (mostly eastbound) moving between CN stations in western and west-central Canada and points south of the Twin Cities gateway and east or southeast of the Chicago gateway. The preponderance of this traffic is interchanged with DW&P at Duluth, MN. Soo Line has the most direct route between Duluth and Chicago of the four railroads serving both cities. However, Soo Line contends that to a considerable extent the advantages of the direct route will be nullified by the expedited service which will result from the merger between the Twin Cities and such major gateways as Memphis, Birmingham, and Dallas-Fort Worth.

Soo Line and Frisco have no direct connections. The two carriers have had a friendly working relationship with respect to interline traffic moving through or between their respective territories. Soo Line believes this relationship will convert to a tone of strict competition in regard to all traffic which can be handled in single-line service or with extended haul by a merged BN-Frisco. Soo Line conducted a traffic study to determine the impact of the proposed merger. The study is analyzed in appendix H.

[30] *Minneapolis, St. P. & S. S. M. Ry Co. Reorganization*, 252 I.C.C. 525 (1942).

Net impacts of merger

To estimate the impact of traffic diversion on net revenues, Soo Line prepared a cost study covering the movements judged divertible. It was concluded that the diversions were so diffused over the Soo Line system that no reductions in the number of trains or train-miles could be achieved. Systemwide, it was estimated that 11 cars per day would be diverted. Thus, Soo Line concluded that no changes in maintainance levels were possible and that the only expenses which could be avoided were those directly attributable to each diverted car.

Soo Line's estimates of the operational effects of traffic diversions show that traffic density decreases would be small for most routes (0.1 to 2.3 percent), slightly more for the Twin Ports to Owen line (3.5 percent), and greatest for the line between the Twin Ports and the Twin Cities (4.8 percent).

Soo Line believes that avoidable costs will be restricted to car and trailer costs, fuel costs, joint facility costs, loss and damage, Minnesota gross earnings tax, drayage costs, absorbed switching, and insurance.

With respect to avoidable car and trailer costs, Soo Line utilized conventional methods for calculating car-hire payments for railroad owned and private cars. It was assumed that all sample car-miles were subject to a 100-percent empty return ratio. Where empty car-days were unknown or where car numbers or movement dates were inaccurate, car-days and time-mileage rates were estimated.

Fuel costs were based on the estimated gross ton-miles for each sample car and also assumed a 100-percent empty return ratio. Joint facility costs were computed on a per car basis where applicable and on a prorated basis where such charges involved flat rates, rentals or maintenance and operating charges (fixed or variable). Loss and damage expenses reflect the actual system ratio of loss and damage expenses to freight revenue in 1976.

The Minnesota gross earnings tax was prorated on a mileage basis for movements involving transit through other States. Drayage costs for plan 2 TOFC movements and drayage charges incurred in Chicago were computed for both loaded and empty movements. Absorbed switching charges, where present, were ascertained on the basis of records underlying sample cars. To the extent Soo Line's insurance premium costs are based on operating revenues, costs were reduced on the basis of the reduced revenue.

The table below summarizes the results of Soo Line's traffic, costs, and operating studies.

TABLE 21

Soo Line estimates of traffic diverted to a merged BN-Frisco

Traffic descriptions	Carload loss (A)	Net Revenue loss (B)	Net Expense reductions (C)	Net Revenue loss (D)
Interline forwarded:				
From Twin Cities via Chicago—	65	$14,294	$11,702	$2,592
From Twin Ports via Chicago —	68	28,462	15,565	12,897
From Wisconsin Rapids and Stevens Point via Chicago ------	12	5,370	998	4,372
From Twin Ports via Minneapolis-	9	2,354	779	1,575
Total ----------	154	50,480	29,044	21,436
Interline received:				
To Twin Cities via Chicago ------	380	137,825	68,140	69,685
To Twin Ports via Chicago ------	32	106,273	6,735	3,892
To Wisconsin Rapids and Stevens Point via Chicago ----------	25	9,399	2,266	7,133
To Twin Ports via Minneapolis -	2	277	313	(36)
Total ----------	439	158,128	77,454	80,674
Overhead:				
From Portal ---------- off at Chicago -----	100	23,555	9,234	14,321
From Noyes ---------- ---------do ----------	104	53,924	14,357	39,321
From Twin Ports---------- ---------do ----------	1,109	411,675	128,175	283,500
From Twin Cities---------- ---------do ----------	179	42,479	18,661	23,818
From Black Creek and Plover--- ---------do ----------	28	3,842	1,777	2,065
From Portal ---------- off at Minneapolis-	124	37,249	9,815	27,434
From Noyes ---------- ---------do ----------	------	------	------	------
From Twin Ports---------- ---------do ----------	578	95,026	35,747	59,279
To Portal---------- on at Chicago ----	342	121,711	44,582	77,129
To Noyes---------- ---------do ----------	168	91,736	25,770	65,966
To Twin Ports---------- ---------do ----------	201	72,032	29,118	42,914
To Twin Cities---------- ---------do ----------	311	98,512	36,521	61,991
To Black Creek and Plover ----- ---------do ----------	48	12,889	3,492	9,397
To Portal---------- on at Minneapolis-	------	------	------	------
To Noyes---------- ---------do ----------	8	2,700	900	1,710
To Twin Ports---------- ---------do ----------	42	5,341	3,340	2,001
Total ----------	3,342	1,072,671	361,579	711,092
Total all classes ----------	3,935	1,281,280	468,077	813,202

Applicants assert that the impact of the merger on Soo Line will be minimal and will not impede Soo Line's ability to provide

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transportation service to the public. Applicants' traffic diversion study found a gross revenue loss to Soo Line of about $250,000. Applicant's use of Rail Form A costs revealed a net loss of $60,000. Applicants have vigorously opposed Soo Line's diversion study, but not that, even accepting the traffic claimed by Soo Line as divirtible, their application of Rail Form A costs to that traffic reveals that Soo Line would achieve a minor grain in net revenue if that traffic were lost. Applicants suggest that a substantial portion of the traffic in Soo Line's diversion study produces marginal revenue relative to average cost and borders on being noncompensatory traffic for that carrier. Accordingly, applicants assert, loss of such traffic does not warrant compensation at the expense of the merged company.

Even if Soo Line were actually to incur some losses, applicants state that there is no justification for imposing extensive conditions on the merger for its benefit. Applicants note that Soo Line is a financially strong carrier which produced approximately $190 million in operating revenues in 1976, returning 10.5 percent on average shareholder equity. In 1977 Soo Line earned over $217 million in total revenues and returned 11.5 percent on shareholder equity. Net railway operating income exceeded $16 million in 1976 and almost $19 million in 1977.

Applicants point out that Soo Line is a strong carrier in its own right, but that Soo Line does not stand alone in light of CP's stock holdings. Applicants note that despite CP's interest in maintaining Soo Line's profitability, Soo Line claims over $300,000 in losses on joint CP-Soo Line traffic.[31]

Applicants also contest Soo Line's allegation that it will lose $500,000 on movements it now handles in connection with CN and DW&P, a CN subsidiary. Applicants note that Soo Line has the most direct route between Duluth (where most southbound traffic moves off the DW&P) and Chicago, and Soo Line presently handles twice as much DW&P traffic as BN. Applicants suggest that joint CN-DW&P routing maximizes CN family earnings just as CP-Soo Line routing maximizes CP family earnings. This, according to applicants, will insure that southbound CN traffic will continue to move over Duluth, and Soo Line's direct route preference in CN routings will continue to hold this traffic to its lines. Applicants dispute the divertibility of $454,241 of this traffic.

[31] Applicants note that such a claim was previously rejected by this Commission in *Burlington Northern, Inc.—Control—Green Bay*, 354 I.C.C. 437, 518 (1977).

Based on the preferred routings of CP and CN, applicants concluded that approximately $750,000 of Soo Line's claimed $1.28 million in diversions consists of traffic which is not susceptible to diversion.

Impact on shippers and employees

Soo Line avers generally that the merger will divert traffic from its lines and that, if the merger is approved, its proposed conditions are necessary to render efficient transportation services to its present shippers and receivers. The impact of the proposed merger upon Soo Line employees will be negligible according to Soo Line, because the preponderance of projected diversions moved as overhead traffic on Soo Line and such a loss will not allow any significant labor reductions.

Protective conditions

Although Soo Line is opposed to the merger, it has proposed nine conditions for its protection in the event the merger is approved. These conditions are set forth in appendix K. They are intended to minimize the impact on Soo Line's traffic and revenue and to preserve its ability to render efficient transportation services to its present shippers and receivers.

Applicants argue that the conditions sought are unnecessary and unjustified in light of the alleged minimal impacts of the merger on Soo Line. According to applicants, the proposed conditions are substantially unrelated to the merger and, if imposed, will result in a financial windfall to the Soo Line. Applicants assert that the evidence does not support the imposition of any conditions on behalf of Soo Line.

Opening of western gateways.—Soo Line proposes opening western gateways between Soo Line and the merged BN-Frisco, specifically Minot and Bismarck, ND, and Detroit Lakes, Erskine, and Thief River Falls, MN. Soo Line claims that BN and its predecessors, GN and NP, generally refused to open gateways with Soo Line west of the Twin Cities for traffic moving eastbound or westbound through the Twin Cities gateway. All such traffic must be interchanged at either the Twin Ports or the Twin Cities.

Soo Line points out that the condition would not deprive shippers and receivers of the right to select BN's longest route on any competitive traffic. It would merely afford them the opportunity, as an alternative, to give Soo Line a longer haul on selected competitive traffic.

The condition is designed to permit *only* Soo Line, not the new unified company, to extend its length of haul. A mutual opening of these gateways, particularly Minot, would subject Soo Line to enormous potential short hauling of traffic interchanged with CP over the Portal, ND, and Noyes, MN, gateways, it contends. A mutual opening of the gateways would result in a substantial net benefit to BN, thus vitiating the protection which the condition was designed to provide, Soo Line argues.

To measure the impact of this condition, Soo Line conducted a traffic study based on the traffic interchanged between itself and BN at the Twin Cities and the Twin Ports in 1976.

Soo Line estimates that imposition of its condition would result in a gain of 1,370 carloads, of which 1,009 would be rerouted via Minot, 194 via Detroit Lakes, 69 via Erskine, 90 via Thief River Falls, and 8 via Bismarck. About 83 percent of the traffic considered to be gained is comprised of interline forwarded movements.

Soo Line asserts that it has excess capacity on the lines over which traffic would move. Further, the addition of the estimated 1,370 carloads would not require any increase in maintenance expenditures because no additional trains would be required.

To estimate the net revenue to be gained, Soo Line considered car and trailer costs, fuel costs, loss and damage, Minnesota gross earnings tax, and insurance. These costs were calculated for each (sample) carload projected to have a longer haul.

Soo Line concluded that the condition would produce an estimated $527,924 in gross revenue, which would be offset by $131,394 in increased costs, yielding a net revenue gain of $396,530. Table 22, below, summarizes the results.

TABLE 22

Western gateway condition

SOO LINE'S ESTIMATED NET REVENUE GAIN (1976 FIGURES)

Traffic descriptions	Carload increase	Revenue gain	Expense increase	Net revenue gain
Interline forwarded:				
To Minnesota destinations	173	$100,821	$16,919	$83,902
To other west of Minnesota destinations	988	339,536	90,484	249,052
Total	1,161	440,357	107,403	332,954
Interline received:				
From other west of Minnesota origins	50	13,584	5,240	8,344
Total	50	13,584	5,240	8,344

Western gateway condition—Continued

SOO LINE'S ESTIMATED NET REVENUE GAIN (1976 FIGURES)—Continued

Traffic descriptions	Carload increase	Revenue gain	Expense increase	Net revenue gain
Overhead:				
Received at Chicago	36	$11,679	$3,195	$8,484
Received at Sault Ste. Marie	65	46,111	11,282	34,829
Received at all other junctions	58	16,193	4,274	11,919
Total	159	73,983	18,751	55,232
Grand total	1,370	527,924	131,394	396,530

Applicants argue that the western gateway condition is unwarranted by the evidence and totally unrelated to the merger. According to applicants, imposition of this condition would result in a windfall to Soo Line of over $1 million annually, or a net gain of $421,300 annually, while costing the merged company approximately $470,000 in net revenues. Applicants find this condition unjustified since Soo Line has not shown that service over these gateways is presently inadequate, that significant service improvements would result, that shippers support such an opening, and that this condition is related to the merger. Applicants asserts that the sole aim of this condition is to divert existing traffic from BN.

Applicants argue that the effect of this condition would be to shift the interchange points of joint BN-Soo Line traffic from the allegedly efficient Twin Cities interchange point to the western gateways, where in all but the case of Thief River Falls, interchange would be less frequent and efficient. Applicants assert that the Commission should not impose a condition which will actually lead to worsened service.

Trackage rights options.—If the merger is approved, Soo Line desires trackage rights conditions constituting options, any one or more which Soo Line could exercise in the future at its own discretion. The trackage rights sought are limited to the movement of overhead (bridge) traffic; Soo Line does not seek rights to provide service to or from BN stations on the lines over which Soo Line would operate.

Soo Line does not propose to pay any rent for use of these lines and the agreements are to be terminable only by Soo Line. Soo Line

would pay a portion of maintenance and operating costs based on its relative use of the BN lines.

Soo Line states that although its existing routes (from which the bridge traffic would be removed) are light density lines, there is no present intention to abandon them. Any abandonments would be pursued only after complete study and presentation of full abandonment cases before this Commission. According to Soo Line, all of the lines originate and terminate very little traffic; even with inclusion of overhead traffic, the density is so light that the lines are candidates for abandoment study in the long run. Soo Line believes that the BN lines over which trackage rights are sought have ample excess capacity and are not significantly longer than the existing Soo Line routes. In Soo Line's opinion, BN would benefit through shared operating and maintenance costs.

The principal advantages alleged by Soo Line, apart from rent-free use of the BN lines, would be that maintenance costs on its own lines would be held down and future rehabilitation avoided. Further, rerouting of the bridge traffic over BN would extend the life of the Soo Line routes for use as local service lines. Finally, substitution of the BN routes for Soo Line's own routes would satisfy various requirements of Soo Line mortgages which require substitution of routes if the continuity of existing lines is broken.

Trackage rights are sought over the BN line extending from McGregor, through Carlton, MN, to Superior, WI. Through traffic would be shifted onto the BN line from Soo Line's own route between the points, which runs via Moose Lake, MN. Through traffic (excluding sporadic iron ore traffic) over the Soo Line route amounted to 498,000 gross tons, or 99.6 percent of total traffic between McGregor and Moose Lake in 1977. From Moose Lake to Superior, this traffic is combined with traffic moving over the line from Brooten to Superior. The through traffic consists largely of forest products moving from Remer, MN, into Wisconsin.

Soo Line states that the reduction of traffic between McGregor and Moose Lake would obviate installation of 15 miles of relay rail, ballast, and crossties. A revised connecting track between Soo Line and BN would have to be constructed at McGregor, and a new connection would be required at Superior. The latter connection would also be required to implement the other trackage rights sought by Soo Line.

Soo Line anticipates the operation of one train in each direction every 7 days (subject to volume requirements) over the BN line. This train would be a turnaround service between Superior and

Remer, serving only points between McGregor and Remer. Ore trains (normally one per week in each direction between the Cuyuna Range and Superior) would also use the line. Soo Line does not expect any significant traffic growth in the territory in the next few years.

If trackage rights from Schley to Superior are denied and rights between McGregor and Superior granted, Soo Line states that it would operate its trains from Thief River Falls to McGregor via its own line, thence via BN to Superior. This would permit abandonment of its McGregor-Moose Lake-Superior route after appropriate abandonment authorization.

Soo Line states that BN's daily operation over the McGregor-Carlton-Superior route in 1976 consisted of 2 trains in each direction between McGregor and Carlton and 16 in each direction between Carlton and Superior. The latter, however, includes one train in each direction operated by the Milwaukee Road in 1976; Milwaukee Road presently does not use the routes. Soo Line estimates that its traffic would add a maximum of 5 percent to the density over the BN line.

Soo Line has withdrawn its request for trackage rights from Paynesville to Superior, WI.

Soo Line seeks trackage rights over a BN line extending from Schley (Soo Junction), MN, through Carleton to Superior. Under this proposal, Soo Line's bridge traffic moving over its own Schley-Superior route via Moose Lake would be transferred to the BN route. Traffic density over the Soo Line route would be reduced by 384,000 GTM between Plummer (through Schley and McGregor) and Superior. (Trackage rights between McGregor and Superior reduce that segment's traffic density by another 498,000 GTM.)

Soo Line states that acquisition of trackage rights over the BN Schley-Superior route would permit the avoidance of installation of 90 miles of relay rail, ballast, and crossties between Schley and Moose Lake. In addition, reduction of maintenance would permit the elimination of one section crew.

Soo Line asserts that a seasonal maximum of three trains per week in each direction, subject to volume and service consideration, would be operated over the BN line. Eastbound trains would move on alternate days between Bemidji, MN, a point west of Schley, and Superior. Westbound trains would operate on alternate days between Superior and Schley. No substantial short-term service requirement changes are foreseen.

Pending completion of future abandonment proceedings, regular service would not be maintained on Soo Line's own line between

Schley and Remer, MN, but if trackage rights between McGregor and Superior are granted, a turnaround service between Superior and Remer would be provided, using the BN line from Superior to McGregor and the Soo Line route from McGregor to Remer. If the McGregor-Superior trackage rights are denied and the Schley-Superior rights granted, once a week or as needed service would be maintained between Superior and Remer over Soo Line's own route via Moose Lake. Soo Line points out that existing service between Remer and Superior varies widely, and no substantial change is expected. Most of the present traffic is seasonal, being heaviest in the harvest months.

During 1976, Soo Line states, BN's normal daily operations over the Schley-Superior route were as follows:

Between Gunn (Grand Rapids), MN, and Boylston: 11 trains in each direction;
Between Gunn and Schley: approximately half the number of trains operating between Gunn and Boylston; and
Between Boylston and Superior: 15 BN trains in each direction and 1 Milwaukee Road train in each direction.

Soo Line estimates that its traffic would increase the total density on BN's lines by a maximum of 4.4 percent.

Soo Line also seeks trackage rights over BN lines from Superior south to Bald Eagle, MN. Through traffic presently moving over Soo Line's own route between these points would be handled via the BN line. According to Soo Line, the shift would reduce traffic density on its own route by 1.42 million GTM. This reduction would permit the avoidance of the installation of 48 miles of rail relay, ballast, and crossties. Maintenance expenses would be reduced.

In addition to the track connection required at Superior, Soo Line states that another connection would be necessary at Bald Eagle at an estimated cost of $65,000.

Soo Line proposes to operate one train a day, 6 days a week, in each direction over BN and foresees no change in this operation in the next 3 to 4 years. Soo Line states that BN traffic over the line is very light and consists primarily of local service. Milwaukee Road also uses the line for service between the Twin Cities and Duluth. Existing daily service on the BN line, according to Soo Line, consists of the following:

Between Bald Eagle and Hinckley: three trains in each direction (including Milwaukee Road);
Between Hinckley and Boylston: eight trains in each direction (including Milwaukee Road); and

Between Bolyston and Superior: 1 Milwaukee Road and 15 BN trains in each direction.

Soo Line asserts that stations on its present route between Dresser and Danbury, WI, including the St. Criox, WI, branch would be served once or twice a week or as necessary, with freight originating at Barron, WI. This operation is presently conducted during seasonal traffic peaks. Through traffic presently moving on the Soo Line route constitutes about 94.7 percent of total traffic between St. Criox Junction and Superior. Shifting the through traffic to the BN line would increase the latter's density by 33.3 percent between Bald Eagle and Hinckley, 19.5 percent between Hinckley and Boylston, and 4 percent between Boylston and Superior.

Soo Line's estimates of benefits (adjusted to reflect 1978 cost levels) from the proposed trackage rights are summarized in table 23. The net benefits shown are the cost savings to Soo Line if all trackage rights options were consummated. These benefits do *not* include potential benefits which might result from a future abandonment of one or more of the parallel Soo Line routes previously described.

TABLE 23

Soo Line proposed options for operating rights

	Potential long-range cost changes (+)(-)(a)
Maximum potential relay and rehabilitation costs:	
McGregor, MN and Superior, WI	-$844,400
Schley (Soo Junction), MN and Superior, WI	(b)-5,181,500
Bald Eagle, MN and Superior, WI	-2,740,100
Construction of connections:	
McGregor	+60,000
Bald Eagle	+65,000
Superior (MJ Tower)	+231,000
Total:	
Net potential long-range cost changes	(c)-7,565,600

Notes:
(a) 1978 cost level.
(b) Includes McGregor-Superior expense of $844,400.
(c) Excludes duplication of $844,400.

360 I.C.C.

Applicants argue that the proposed trackage rights options are unnecessary for Soo Line's protection and inconsistent with the public interest. Applicants assert that (1) the nature of conditions as options do not permit the parties or the Commission fully to analyze their effects, (2) they are totally unrelated to the proposed merger, (3) they are unsupported by any evidence that the public interest warrants their imposition as conditions to this transaction, (4) they are unjustified given Soo Line's ability to withstand the minimal impacts of the merger, and (5) they would add to the overcompensation which Soo Line's conditions would allegedly generate for Soo Line's benefit.

Soo Line allegedly seeks these options as a means of restructuring its light density lines in Minnesota and Wisconsin. It seeks the opportunity to abandon its own light density lines, realizing substantial savings in rehabilitation and maintenance costs while operating over parallel BN lines without paying BN rental. Soo Line proposes to make payments on a usage basis, to which applicants object.

Applicants note that trackage rights such as those requested are normally the subject of private negotiation between the parties. Applicants suggest that the Commission should not interfere in such processes, particularly since Soo Line will be harmed only minimally.

Termination of pooling agreement.—Soo Line seeks the ability to terminate a 1929 pooling arrangement with BN's predecessors.[32] Soo Line's share of Cuyuna Range iron ore tonnage was increased through imposition of a condition on approval of the *Northern Lines Merger.* This condition resulted in a supplemental agreement between BN and Soo Line, approved by this Commission. Also approved were certain implementing trackage rights and the construction of connecting tracks.

Subsequently, Cuyuna Range iron ore production decreased, and Soo Line's iron ore traffic declined from 223,409 tons in 1973 to 113,991 tons in 1977. (A low point was reached in 1976 at 99,908 tons.) Soo Line states that its fleet of iron ore cars has declined "very substantially."

Soo Line specifically seeks to be relieved of the existing terms of the agreement, which require annual rental payments of $41,528 until the year 2028 unless ore shipments cease for a period of 5 consecutive years (after which Soo Line may, with the necessary

[32] *See Northern Pac. and M., St. P. & S. S. M. Ry. Cos. Joint Operations,* 154 I.C.C. 279 (1929) and *Northern Pac. and Soo Line Operation,* 187 I.C.C. 800 (1932).

approval of public authorities, abandon operating rights granted under the agreement). In short, Soo Line seeks the right unilaterally to terminate the agreement subject to Commission approval.

Applicants argue that Soo Line has not shown the Cuyuna Range traffic to be unprofitable. Moreover, applicants allege that the option nature of the condition is calculated to allow Soo Line to avoid its obligations if and when it decides those obligations are not outweighed by the benefits of its agreement. Applicants allege that Soo Line could operate its own trains at lower cost over the trackage segment sought between McGregor and Superior. Therefore applicants question the necessity of this condition, other than the relief from the obligation of an annual trackage rights payment.

Tunnel agreement.—In 1906, the Minneapolis, St. Paul & Saulte Ste. Marie Railroad Company, predecessor of Soo Line, constructed a line from its main line north of the Twin Cities into the downtown area of St. Paul. To reach Soo Line yard properties, it was necessary that a tunnel be constructed under existing trackage of GN. An agreement authorized construction of the tunnel but required Soo Line to maintain the portion of the tunnel supporting the BN tracks in perpetuity. The portion of the tunnel supporting the overhead tracks consists of steel beams encased in reinforced concrete in the roof of the tunnel structure itself, and essentially performs as a bridge.

Soo Line has obtained authority from the Commission to abandon its operations through the tunnel into downtown St. Paul. With passage of time, it will be necessary either to replace the bridge strucutre or to fill the tunnel. The simplest procedure would be to dynamite the tunnel, fill the space, compact the material and replace the original railroad embankment, restoring it to its condition before the tunnel was constructed. It is estimated that this would cost approximately $127,000.

Soo Line requests that the Commission require BN to release Soo Line from its obligation to maintain the portion of the tunnel which supports the overhead operations of BN. Relieving Soo Line of this obligation is sought as an additional means of indemnifying Soo Line against losses which will be incurred as a result of traffic diversions resulting from the merger.

Applicants assert that the tunnel agreement, originally negotiated for Soo Line's benefit, bears no relationship to the merger. The agreement was privately negotiated, and applicants assert that changes in the agreement should be similarly negotiated.

Modified traffic conditions.—Soo Line requests a modification of the standard DT&I conditions. It alleges that the *Northern Lines Merger*, despite imposition of the DT&I conditions, resulted in misroutings of cars contrary to the conditions and also "numerous incidents" of BN's refusal to afford Soo Line new routes and joint rates in accordance with the conditions. In other alleged incidents, Soo Line states that BN unduly delayed such actions.

Soo Line believes that the DT&I conditions, while laudatory in purpose, are difficult to police and enforce, and that its proposed modifications offer greater protection through more detailed treatment of each provision.

Applicants assert that BN did not violate the *Northern Lines Merger* conditions and that each example cited by Soo Line was refuted by BN. Applicants find no justification for the imposition of the requested conditions and state that they would be an unnecessary restriction on the merged company.

Commission jurisdiction.—Soo Line wants to protect its future growth against adverse effects of the merger which would be uncompensated if its other requested conditions fail to make it whole. Soo Line asks the Commission to retain jurisdiction in this proceeding for 5 years following consummation to hear applications by the Soo Line for future operating rights over grain gathering lines of the merged company. The lines selected will be those producing annual gross revenues from grain traffic equalizing Soo Line's remaining uncompensated annual loss of gross revenue caused by the merger.

Under this proposed condition, the merged company would be required to seek Commission authority for abandoment of operations over the lines over which Soo Line is authorized to operate. The abandonment would take place on the effective date of the Commission's approval of operations by the Soo Line.

Applicants find this condition totally objectionable because its goal is compensating Soo Line for its entire loss. Applicants argue that protesting carriers are not entitled to full compensation for losses. Further Soo Line has failed to introduce evidence of the public interest in such a condition, even though the requested condition would require abandoment of BN service on routes selected by the Soo Line.

Finally, applicants argue that problems of administration, such as defining "uncompensated losses," are inherent in the proposal and inadequately addressed by Soo Line.

Soo Line believes that the condition preserves its ability to resolve controversies with the merged company concerning the interpretation and the terms of conditions granted by the Commission.

To the extent Soo Line has attempted to quantify the revenue changes resulting from all of its proposed conditions, such estimates are set forth in table 24.

TABLE 24

Soo Line Railroad Company proposed conditions

SUMMARY OF ESTIMATED RECURRING INCOME CHANGES(a)

	Amount
Operating of western gateways [Net revenue gain at 1978 levels of revenue and cost.]	+$457,000
Option for operating rights between:(b)	
McGregor, MN and Superior, WI	-16,667
Schley (Soo Junction), MN and Superior, WI	-15,320
Bald Eagle, MN and Superior, WI	-263,170
Terminate Cuyuna Range pooling agreement [5 years only]	+41,528
Release of Soo Line by BN from obligations *** relating to Soo Line tunnel in St. Paul, MN	(c)
Traffic conditions requested by Soo Line	
Reservation of jurisdiction to require BN to grant to Soo Line operating rights over grain gathering lines ***	
Reservation of jurisiction to resolve controversies between BN and Soo Line ***	
Total income	+203,371

Notes:
(a) Before income taxes. 1978 figures.
(b) Does not include operations expense over BN-Frisco trackage.
(c) One-time cost savings of $127,000.

OTHER RAILROADS

Denver and Rio Grande Western Railroad Company

Rio Grande operates a 1,868-mile system in Utah and Colorado. The termini of its system are Ogden, UT, on the west, and Denver and Pueblo, CO on the east. In 1976 Rio Grande had gross revenue of $168,503,000. Its net income was $18,933,000.

Rio Grande requests that the conditions it has proposed (in appendix K), along with financial penalties for violations of

conditions proposed by CNW and Milwaukee Road, be imposed. It contends that the enforcement of conditions is a difficult and lengthy process. Rio Grande believes penalties will provide an incentive to comply with the conditions.

Rio Grande argues that applicants' projected revenue gain to Rio Grande of approximately $1.4 million as a result of merger is incorrect in magnitude, but that imposition of its requested conditions will insure the accuracy of the merger impact projections.

Applicants point out that Rio Grande presents no evidence and is seeking protective conditions from a merger which will benefit it. They argue against financial penalties for violation of conditions.

None of Rio Grande's employees will be adversely affected by the merger.

Missouri Pacific Railroad Company

Mopac operates a system of approximately 11,500 miles in Arkansas, Colorado, Illinois, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Texas. Mopac provides service from Omaha and Chicago on the north, St. Louis, Memphis, and New Orleans on the east, the Gulf of Mexico on the south, and El Paso, TX, and Pueblo, CO on the west. Mopac also serves Kansas City, Dallas-Fort Worth, and Houston.

Mopac had gross revenues of $902,488,000 in 1976, with net revenues of $71,852,000. It is estimated that the merger will divert approximately $7.7 million in gross revenue from Mopac (at 1976 levels).

Mopac reached an agreement with BN and Frisco as to protective conditions, providing for a modified form of traffic protective conditions. Applicants support Mopac's requested conditions because they will generally provide for and encourage competitive opportunities and foster cooperative spirit.

The employees of Mopac will not be adversely affected by the merger.

Kansas City Southern Railway Company

KCS generally operates between Kansas City, MO, on the north and New Orleans, LA, and Port Arthur, TX, on the south, with an extension from Shreveport, LA, to Dallas, TX. It serves Missouri, Kansas, Oklahoma, Arkansas, Texas, and Louisiana. In 1976, KCS

had gross revenues of $147,393,000. The estimated diversion from KCS resulting from the merger is $2,027,420.

KCS entered an agreement with BN and Frisco as to protective conditions. The conditions are an expanded version of the standard traffic conditions and are set forth in appendix K.

KCS contends that the merger must be conditioned according to their stipulation in order for the merger to be in the public interest. KCS points out that while the loss of gross revenues is not overwhelmingly large, the net income loss warrants protection. It argues that the Commission has imposed traffic protective conditions even where no railroad would suffer serious anticompetitive effects from the merger.[33]

Applicants acquiesce to the conditions sought by KCS and state that the conditions generally provide for and encourage competitive opportunities and foster cooperative spirit.

No KCS employees will be adversely affected by the merger.

The Atchison, Topeka and Santa Fe Railway Company

Santa Fe operates about 13,000 miles of railroad in Arizona, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, and Texas. Santa Fe provides services between San Francisco and Los Angeles on the west and Chicago and Kansas City on the East. It also serves Denver, Oklahoma City, Dallas-Fort Worth, Houston, and Galveston.

Traffic diversion from Santa Fe is projected between $6.7 million (by applicants) and $8.1 million (by Santa Fe). Santa Fe had gross revenues of $1,149,248,000 in 1976. For the same year net income was $52,614.

Applicants have reached an agreement with Santa Fe to grant a modified version of the standard traffic protective conditions, and do not oppose Santa Fe's acquisition of control of the Toledo, Peoria and Western Railroad Company. Applicants also support these conditions on the ground that they will generally provide for an encourage competitive opportunities and foster cooperative spirit.

Santa Fe states that none of its employees will be adversely affected by the merger.

Southern Railway system

Southern serves the territory south of the Ohio and Potomac Rivers and east of the Mississippi River. Every State in this area

[33] *Illinois Cent. Gulf R.—Acquisition—G., M. & O. R. et al.*, 338 I.C.C. 805, 842 (1971).

except West Virginia is served by Southern, which also operates lines across Indiana and Illinois to East St. Louis. With northern gateways at Washington and Cincinnati, western gateways at East St. Louis and Memphis, and reaching the ports of Norfolk, Charleston, Savannah, Brunswick and Jacksonville on the Atlantic, and Mobile and New Orleans on the Gulf of Mexico, Southern serves nearly every major community in the South.

Applicants estimate Southern would lose $7,925,260 in gross revenue as a result of the merger. To offset this Southern seeks imposition of the conditions it stipulated to with BN (in appendix K). BN joins the request.

The conditions sought are intended to preserve rail competition in the territories served by Southern, BN and Frisco; to preserve neutrality in the handling of traffic; to maintain existing gateways and run-through train operations; to prevent deterioration of existing operating relationships between Southern and the applicants on the reduction of service levels on joint movements; to prevent discrimination in service levels as to interchange traffic; to preserve the rights of shippers to route traffic as desired; and to preserve the opportunity for Southern to participate in through routes and rates on present and future traffic.

According to Southern, the public interest will be served by: providing shippers with a greater variety of routing options; ensuring preservation of current high levels of service on traffic moving jointly over Southern and the new consolidated company; and ensuring Southern's local shippers and receivers that they are not disadvantaged in service on movements to and from points on lines of the merged BN. Southern states that shipments moving between points north and/or west of Galesburg, IL, and points on Southern in Kentucky, Illinois, Indiana and Ohio, as well as points in the Carolinas moving via Knoxville, are especially dependent on the BN-Southern interchange at Centralia, IL, The proposed conditions will protect Southern against any unjustified downgrading in levels of service at this interchange points and at other interchange points such as Birmingham, Memphis and East St. Louis.

Southern notes that the proposed conditions are substantially similar to the standard DT&I traffic protective conditions traditionally imposed by the Commission. To the extent the proposed conditions are more specific, Southern asserts they represent a minimum response necessary and appropriate to protect

Southern and its local shippers. Southern states that its modifications are not novel.[34]

Applicants argue that the stipulated conditions permit existing railroads to mitigate the effects of the merger through service improvements, more agressive solicitation, and other forms of competitive self-help, without reducing the benefits of the merger to the merged company. The additional conditions agreed to with Southern are also designed to provide for and encourage competitive opportunities and foster competitive service and operation between Southern and applicants.

No Southern employees will be adversely affected by the merger.

Family Lines

The Family Lines primarily operate 16,750 miles of track in the Southeast. They serve Washington, DC, Cincinnati, and Chicago on the north; East St. Louis and Memphis on the west; New Orleans, Tampa, and Miami on the south; and Jacksonville, Savannah, Charleston, Wilmington, NC, and Norfolk on the east.

The Family Lines executed a stipulation with BN-Frisco for conditions to preserve existing routing, traffic, and operating policies of the applicants.

Applicants estimate that the Family Lines will suffer a gross revenue loss of $5.25 million as a result of the merger. The Family Lines believe this estimate is conservative and that the stipulated conditions are required to preserve the Family Lines ability to serve their patrons. Applicants point out that the conditions will allow Family Lines to mitigate the effects of the merger through improvements in their own operations without reducing the benefits from the merger.

The employees of the Family Lines will not be adversely affected by the merger.

Chicago and North Western Transportation Company

CNW operates about 10,000 miles serving the region west of Lake Michigan and south of Lake Superior, including Illinois, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, South Dakota, Michigan, Wyoming, Missouri and Kansas. CNW serves important industrial, forest, agricultural, and livestock sections of the north and central

[34] *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 756-760 (1967).

west, as well as ports on Lakes Michigan and Superior, the iron ore ranges of the Upper Peninsula of Michigan, and the Springfield district coalfield in Illinois.

Applicants estimate CNW would lose about $1.9 million in gross revenues as a result of the merger. CNW estimates the loss to be about $2.4 million.

CNW has withdrawn its opposition to the merger in exchange for applicants' agreement to certain conditions. The stipulated conditions are set forth in appendix K. They call for traffic conditions ensuring the continued use of gateways and routes, neutrality in handling traffic, and preservation of operating relationships. Additionally, applicants will grant trackage rights to CNW over 140.3 miles of BN trackage between St. Paul, MN, and Superior, WI, over the White Bear Lake route. Applicants also will grant an option to CNW to lease approximately 20 acres of BN land in its Union Yard complex in the Twin Cities area. Upon imposition of these conditions, CNW supports the proposed merger.

CNW employees will not be adversely affected by the merger.

Illinois Terminal Railroad Company

The ITC operates in central and southern Illinois and in St. Louis, MO. It serves the industrial areas of East St. Louis, Granite City, Alton, Wood River, Decatur and Champaign-Urbana, IL, as well as Springfield and East Peoria, IL, and St. Louis, MO. Applicants estimate ITC would lose $80,700 in gross revenues as a result of the merger.

ITC seeks imposition of conditions stipulated by applicants and ITC. The conditions sought are intended to preserve the competitive traffic balance between applicants and ITC. ITC notes that it is an intermediate carrier in routing between applicants and could be excluded from bridge movements. ITC offers the example of traffic which originates in the Chicago area moving to points in the Southwest. It suggests that without the stipulated conditions preserving present neutrality regarding inbound, outbound, and overhead service and continuing present traffic and operating relationships, significant harm could result to ITC.

Applicants state that the stipulated conditions are substantially based on the standard DT&I traffic conditions and are in the public interest because they provide for equality of opportunity to compete for traffic without reducing the benefits of merger.

ITC employees would not be adversely affected by the merger.

Southern Pacific Transportation Company

SP and its subsidiaries operate in California, Oregon, Nevada, Utah, Arizona, New Mexico, Texas, Louisiana, Illinois, Missouri, Arkansas, and Tennessee. Its major routes run from Portland, OR, south through California to (1) San Francisco then east to Ogden, UT; and (2) Los Angeles and then southeast to El Paso, TX, where one route runs northeast to Tucumcari, and another route runs east to New Orleans. SP has extensive trackage in Texas from Brownsville north through Houston to Denison, TX.

SP and its subsidiary SSW would lose $3,479,940 in gross revenues through diversion. However, the employees of SP and SSW would not be adversely affected by the merger.

SP and SSW entered into a stipulation with BN and Frisco for protective conditions to be imposed by the Commission. The protective conditions, set forth in appendix K, are designed to minimize potential SP traffic diversion and to assure continuing interchange through specified gateways. The stipulation also gives SP the option of acquiring trackage rights, which SP has exercised through its application for trackage rights over BN-owned trackage in the Portland area to give SP access to the North and South Rivergate industrial area.

The southerly termini of the trackage rights would be the junction of BN's east and westbound main line with the trackage of the Portland Terminal Railroad between Guilds Lake Yard and Portland Union Station. The northern termini would be the connection between BN and UP trackage near Barnes Yard in the vicinity of East St. John, and also the beginning of North Rivergate trackage at North Portland in the approximate vicinity of BN milepost 8.154. The trackage rights would be bridge rights only.

SP currently serves North Rivergate and Barnes Yard under reciprocal switching agreements with BN and UP. SP maintains that under the current arrangement its traffic is severely delayed, making it unable to keep competitive schedules, and causing shipper dissatisfaction.

Despite the fact that SP does not directly serve Rivergate (UP and BN are its connecting lines), it does receive complaints about service at South Rivergate. Waterway Terminals Company (Waterway), SP's major Rivergate account which has warehouses at South Rivergate and Front Street (also used by Crown Zellerback (Crown Z)), has complained of substantial delays from South Rivergate to SP via UP. Transit time from Waterway's warehouse at South Rivergate had been running 5 to 6 days on shipments to Los

Angeles. Empty car shortages have also raised complaints. SP maintains these problems are a result of the failure of UP to give SP's traffic equal priority with its own. As a result of this slower transit time, SP cannot be competitive with UP on southern California traffic.

During the first 6 months of 1978 Crown Z shipped outbound from Rivergate over 2,980 carloads. Approximately 70 percent of these carloads move to Oregon, Texas, Arizona, and California. SP serves most of this area for Crown Z. During the same period Crown Z shipped 3,363 carloads from its warehouse in Portland and about 70 percent of the carloads moved into areas served by SP. Crown Z has encountered repeated service problems at South Rivergate due to slow switching, transit, and turnaround time on SP movements.

Crown Z supports the stipulation because it believes it will result in better service between Rivergate and Eugene, OR. If the condition is granted, BN would handle SP traffic to the extent that trackage rights are granted.

SP states that using BN as a switch agent is not practical because of the handling necessary. SP seeks these trackage rights in addition to its stipulation with BN-Frisco that would make the merged company handle SP's traffic to and from Rivergate. SP feels it is essential that it have the option to handle its own traffic in and out of Rivergate should SP be unable to work the stipulation to its satisfaction.

As compensation for the trackage rights SP proposes to pay the new company a use proportion of taxes, operating expenses, maintenance, and rental at 6 percent per annum on the ledger value of the facilities and the current value of the land.

SP believes its Rivergate customers will be provided with more timely delivery of empties, better on-time performance, and more competitive service in marketing their products if the trackage rights are granted. SP believes its trackage rights proposal is in the public interest because of the improvement in traffic flow that would result, and because additional rail service would attract new traffic to and promote development of the Rivergate Industrial District.

SP maintains that its stipulation with BN and Frisco is the type of merger condition the Commission may impose under its broad discretionary power. Further, SP states, the Commission has the duty to impose conditions which satisfy the public interest, and there is no need for a carrier to show that it would be impaired in the performance of its common carrier function absent conditions.

SP argues that the Commission should evaluate the proposed conditions in light of the historically hostile relationship between BN, UP, and SP. Broader access to the Port of Portland through increased SP service at Rivergate will benefit the public by improving rail service and ameliorating the current situation wherein SP believes it receives poor service from UP.

SP argues that granting the trackage rights would not adversely impact BN operations, especially since BN has agreed to the trackage rights.

Union Pacific Corporation

UP operates 9,614 miles of road in freight service in 13 States. The UP main lines extend from Omaha, NE and Kansas City, MO to Denver, CO, Portland, OR, Spokane and Seattle, WA, and Los Angeles, CA. UP would lose $5,855,660 in gross revenue as a result of the merger. Its employees would not be adversely affected.

UP, BN, and Frisco have agreed to a set of 15 traffic conditions set forth in appendix K.

UP is opposed to SP's application for trackage rights in the Rivergate area. UP states that it moves South Rivergate traffic from Barnes Yard to Albina Yard to meet schedules set by SP and if requested by SP, UP would, change its Barnes Yard to Albina Yard schedule to meet an earlier schedule for run-through trains set by SP.

UP states that SP use of BN line would be operationally unfeasible unless coupled with rights to UP's Barnes Yard and the UP-BN North Rivergate Yard. Otherwise, there would be no place to interchange Rivergate traffic at the northern termini of the trackage rights to the switching lines. SP operation over BN could disrupt UP operations in those yards and operations on the BN main line as well, it contends.

UP regards SP's application as a first step toward forcing its way onto UP trackage in the Rivergate area. It argues that the Commission has already determined that the public interest would not be served by SP acquiring trackage rights in the Rivergate area.[38]

[38] In Finance Docket No. 27421, *Southern Pacific Transportation Company—Common Use of Terminal Facilities—Union Pacific Railroad Company and Burlington Northern, Inc.* (not printed), decided February 5, 1979, the Commission found that use by SP of terminal facilities within Rivergate Industrial District, together with bridge trackage rights over UP or over any trackage UP has operating rights on, was not practicable without substantially impairing the ability of UP to handle its own business and therefore not in the public interest. The application was denied.

UP states that it has no tracks to devote to an SP interchange; that SP interchange at Barnes Yard would create needless intrayard switching; and that entry of an additional switch engine would add to Barnes Yard congestion and control problems.

SP asserts that the yard can be kept fluid by shifting cars, but UP states that such shifting would impair the very usefulness of Barnes Yard.

SP maintains that the trackage rights would have no effect on UP operations. SP claims that UP's concern that SP will seek to enter South Rivergate (UP's exclusive domain) at some future time is unfounded and unrelated to this request.

Finally, SP states that the proper test to apply to its trackage rights request is the general public interest test used in the context of a merger, not the test for the use of terminal facilities.

PUBLIC BODIES

Department of Defense

DOD appeared in this proceeding to advise the Commission of the impact of the merger on national defense. DOD did not take a position favoring or opposing the merger.

Defense-essential rail lines include main lines, clearance lines, and access lines important to the Nation's defense. The main line system expedites deployment of defense force materials and equipment throughout the Nation via an integrated and interconnected system. Clearance lines allow DOD to ship oversize and/or overweight defense cargo over the main line system. Access lines connect the main line system and defense activities.

DOD reviewed the BN-Frisco proposal with these factors in mind. It did not consider the merger's impact on other carriers when preparing its statement. Based on applicants' statement that there will be no abandonments, no loss of service, and no loss of defense-essential lines, DOD concluded that the application is consonant with the objectives of the Railroads for National Defense Program.

DOD routes traffic over many carriers, insists that all defense-essential methods of transportation be kept viable, supports reduced transit time (because it makes DOD more responsive), and wants the widest choice of routing for flexibility and competition.

In selecting carriers during peacetime it considers, in order of importance, satisfactory service, cost, fuel consumption, and traffic distribution. There are other overriding considerations in wartime.

On these bases, DOD reached its conclusions that the application is consistent with the Nation's defense needs.

Department of Justice

DOJ does not oppose the merger, since it finds no significant anticompetitive effects in relevant markets. DOJ views the proposed trackage rights and indemnity conditions as unrelated to the merger, potentially detracting from merger benefits, and not necessary to correct anticompetitive effects.

A. *The merger.*—The public interest standard governing the merger of surface transportation carriers must consider competition and the underlying policy of the antitrust laws.[36] Hence, DOJ believes that the Commission must consider section 7 of the Clayton Act,[37] which prohibits anticompetitive horizontal and vertical mergers.[38]

DOJ contends that since BN and Frisco do not directly compete against each other in any geographic markets, there are no horizontal merger issues. However, because BN and Frisco interchange traffic, primarily at St. Louis and Kansas City, DOJ considers them to be in a vertical customer-supplier relationship. Because this is an end-to-end railroad merger, there is a presumption that it is not likely to lessen competition substantially. Nevertheless, the merger must be examined to insure that the presumption is not rebutted.

Market foreclosure.—In examining possible market foreclosures, DOJ believes that the cumulative impact of individual foreclosures is the primary analysis to be made. In order to analyze this DOJ considered: total diversions as a percent of gross revenues; carloads diverted as a percent of total carloads carried by protestants over specific corridors; and percentage changes in line density in gross tons of protestants over specific corridors.

Based on applicants' traffic diversion estimates, DOJ concludes that the amount of traffic no longer to be interchanged is small—0.1 to 3.3 percent of gross revenues and will not adversely affect

[36] *Port of Portland* v. *United States*, 408 U.S. 811, 841 (1972); *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 509 (1966); *McLean Trucking* v. *United States*, 321 U.S. 67 (1944); *Northern Lines Merger Cases*, 396 U.S. 491, 511-513 (1970); *Minneapolis & St. Louis R.R.* v. *United States*, 316 U.S. 173, 186-188 (1959); and *Seaboard Air Line R.R. Co.* v. *United States*, 382 U.S. 154, 156-157 (1965).

[37] 15 U.S.C. 18.

[38] *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

competition because of the large number of parallel railroads in the central corridors from Wisconsin to Texas, Tennessee, and Alabama.

In measuring carloads diverted, DOJ considers the following corridors of primary concern: (1) to Houston via Kansas City; (2) to Memphis and Birmingham via St. Louis and Centralia and Woodlawn, IL; (3) between Kansas City and the Illinois-Wisconsin area; and (4) between St. Louis and Chicago.

From Kansas City to Houston, Santa Fe, Rock Island, and MKT would experience carload diversions in the corridor of 1.0, 2.4, and 11.2 percent, respectively. Gross tons diverted would be 0.8, 2.5, and 11.9 percent, respectively. Information for viability may suffer, DOJ points out that the three other competitors will remain, and that the Clayton Act is designed to protect competition, not competitors.[39]

The Kansas City-Illinois-Wisconsin corridor is served by Milwaukee Road, CNW, and Rock Island, along with BN. They would lose 4.1, 2.3, and 1.6 percent of carloads carried, respectively. Gross tons diverted would be 3.4, 2.1, and 1.4 percent, respectively. DOJ concludes that the relatively small changes in density that are expected from the merger suggest that anticompetitive rate increases are unlikely, and that any changes in unit costs resulting from changes in line density would be small.

This is partially based on competition between eight carriers over the part of this route between Kansas City and Chicago, and the improbability of anticompetitive price increases on the overall route as a result of the merger.

According to DOJ, between St. Louis, Centralia, and Woodlawn, and Birmingham and Memphis, ICG will lose 4.0 percent of total carloads and 3.4 percent of gross tons. But Southern and L&N also compete in the corridor, although no traffic analysis was made. Because of these two carriers and the small change for ICG, DOJ concludes that the merger would not lessen competition in this corridor.

Between Chicago and St. Louis, DOJ considers five direct lines, operated by four carriers in competition. CNW and ICG will lose 3.3 and 7.8 percent of carloads, respectively, and 2.6 and 4.7 percent of gross tons, respectively. MoPac and N&W also compete in this corridor. Thus, DOJ concludes that competition in this corridor will not decrease.

[39] *Id.* at 320.

Finally, DOJ points out that almost 70 percent of applicants' present interchange arrangements in these corridors will not be affected by merger. DOJ concludes that competition will not be substantially lessened because line densities will not be affected significantly.

Elimination of potential competition.—DOJ indicates that *de novo* entry into the BN or Frisco markets by the other is not a feasible alternative to merger. DOJ postulates that trackage rights is the only method of entry, and since this trackage rights is the only method of entry, and since this generally results from a negotiated contract, there is no way to predict entry or the assurance of entry by either merger partner into the other's market. DOJ concludes that the merger will not eliminate BN as a competitor in relevant markets.

Entry barriers.—Again DOJ concludes that trackage rights is the only feasible method of entry in developed markets in the rail industry. Since reciprocal bargaining occurs before a trackage rights agreement is entered, DOJ believes additional barriers to entry will not be created by the merger in relevant rail corridors.

DOJ conclusion.—Based upon its analysis, DOJ concluded that if single-line service is implemented, the public could benefit from reduced transit times, improved freight car supply, and increased service reliability without a reduction of the number of carriers in relevant corridors.

Railroad response.—The Milwaukee Road, MKT, Rock Island, ICG, and Soo Line all argue that DOJ's competitive analysis is too narrow and does not consider the public interest. MKT and Milwaukee Road question the use of applicants' data, and not protestants' or DOJ's.

MKT points out that if its diversion figures are utilized, it will lose approximately 20 percent of its carloads and gross tons in the corridor between Kansas City and Houston.

B. *Conditions.*—DOJ does not believe protective conditions are warranted when a merger is not anticompetitive and the conditions are unrelated to the merger and detract from merger efficiencies. It urges the Commission to focus on the preservation and enhancement of competition in relevant corridors, rather than preserving corporate entities.

Trackage rights.—DOJ contends that the trackage rights proposed in these proceedings address situations that are unrelated to the merger and should be denied. The trackage rights sought to

eliminate circuity not caused by applicants are believed to be exactions from BN and Frisco that could not be obtained through negotiation. The trackage rights which would serve new markets, although enhancing competition are not related to the merger because competition over those lines is not changed by the merger. DOJ concedes that these results may be beneficial and in the public interest, but argues that a merger proceeding is not the appropriate forum to address the woes of the railroad industry.

Indemnification.—DOJ views indemnity to Rock Island and MKT as contrary to proper transportation policy and detracting from the benefits of merger.[40]

DOJ points out that Rock Island seeks indemnity so that it can benefit from the efficiencies of the merger that have caused traffic diversion, while Katy seeks indemnity in order to repay loans to the Federal Government.

Because there is price and service competition from other carriers in the corridors served by MKT and Rock Island, DOJ does not believe their elimination warrants a private industry subsidy through indemnification.

Carrier failure to establish serious anticompetitive effects.—DOJ argues that the losses of gross revenue projected by all protestants, other than MKT, would not seriously impair their financial or operational viability. DOJ concludes that the harm to these carriers is not sufficient to eliminate corridor competition.

With regard to MKT, DOJ takes the position that if it cannot survive the merger, so be it. Katy can restructure, but in any event its presence will not be missed in the competitive climate of the corridors it serves.

Carriers' response.—The protestants believe that DOJ has used too narrow a standard (competition) in considering protective conditions. The public interest is the correct criterion. They point out that the Commission has the power to improve the plight of other railroads, even when there are no anticompetitive effects from the merger.[41]

Katy argues out that it will be viable if the merger does not occur, and merely seeks to obtain relief from the impacts of the merger. It points out that less than 12 percent of its traffic is overhead, and that it performs a necessary competitive purpose.

[40] Although not specifically discussed in DOJ's brief, we presume that it also opposes indemnification to Milwaukee Road for the same reason.

[41] *Illinois Cent. Gulf R.—Acquisition—G., M. & O., et al.*, 338 I.C.C. 805, 842 (1971).

Iowa Department of Transportation

The IA-DOT is opposed to the merger.

There are approximately 7,219 miles of rail line in Iowa, consisting of 3,562 main-line miles and 3,657 branch line miles. Iowa ranks fourth in the Nation in rail mileage, and twenty-fifth in land area and population. Class I railroads comprise 97 percent of the Iowa rail system, with class II railroads serving the remaining 3 percent. Iowa is served by eight class I railroads—CNW, RI, Milwaukee Road, BN, ICG, N&W, Santa Fe, and UP. CNW, RI, Milwaukee Road, and ICG operate approximately 84 percent (6,046 miles) of the State system. BN's east-west line is located mainly along the southern two tiers of Iowa counties and comprises about 11 percent of the total rail-miles. Santa Fe, N&W, and UP provide feeder service to Iowa, with minimal mileage.

Twenty-four percent of CNW's system, 27 percent of RI's system, and 17 percent of Milwaukee Road's system are located in Iowa.

Iowa is a major agricultural State. Compared with other States, Iowa ranked second in corn and soybean production in 1977 and first in corn production in 1978. Iowa provided 20.7 percent of the total corn production and 15.6 percent of the soybean output in the United States in 1978. The export of Iowa farm products in 1978 contributed $2,040 million toward offsetting the national balance of payments deficit, ranking Iowa second among the 12 Midwestern States in agricultural exports. Over 7,322 Iowa agribusinesses employ 140,000 Iowans.

IA-DOT states that there is a symbiotic relationship between Iowa shippers/receivers and RI, CNW, Milwaukee Road, and ICG. Both need and depend upon the other. These four carriers serve the major grain growing and gathering areas and mesh with the fertilizer distribution patterns. Also, the vast majority of the State's multicar grain loading facilities (over 50 cars per train) are located in the areas these four railroads serve.

BN's role in Iowa agriculture and agribusiness is relatively minor. The southern tier of counties in Iowa produce the least crops, require the least fertilizer, and have only one unit-train (75 cars) grain facility.

IA-DOT's interest in this proceeding is to see that its rail transportation remains available. It opposes the proposed merger, having concluded that the merger's impact on the railroads serving Iowa and the resulting impact on their service to Iowans will be disastrous.

According to applicants' forecasts, Rock Island, CNW, Milwaukee Road and ICG will experience 22 percent of all carload diversions, or 40,425 carloads annually. Two of these carriers are in reorganization and will suffer 33.4 percent of the diversions of those four railroads. ICG, a marginal carrier economically, will suffer one-half of the Iowa carrier losses.

Gross carload revenue losses will probably not be offset by cost reductions. The carload loss will not mean fewer trains or reduced numbers of power units or crew numbers in most instances. Instead, these diversions will result in reduced financial return on existing trains and further economic strains on the carriers.

Even though losses suffered by protestant railroads (40,425 carloads annually) will occur largely outside Iowa's borders, the impact of weakening the railroads and their operations will be felt within the State.

IA-DOT believes that the merger application should be denied. If the Commission approves the merger, however, IA-DOT request that the Commission retain jurisdiction for not less than 5 years. IA-DOT believes that by retaining jurisdiction, appropriate relief can be provided where necessary and general direction can be given to rationalizing the midwestern rail system.

IA-DOT contends that before a rail merger is approved, there must be convincing evidence that it will serve the national interest and that terms are prescribed so that the congressional objective of a rail system serving the public more effectively will be carried out. Not every merger or consideration that may be agreed upon by private interests can pass the statutory test.[42]

BN and Frisco argue that their merger is not the proper vehicle to improve the viability of the four weak railroads serving Iowa, and it is not within the Commission's power to restructure the rail situation in the Midwest.[43]

Applicants point out that IA-DOT has not requested Milwaukee Road to operate in Iowa as part of its reorganization plan. Applicants conclude that IA-DOT is concerned with the preservation of essential services, not corporate entities.

Applicants also argue tht the logical reaction for carriers harmed outside of Iowa, but not in Iowa, is to concentrate their resources (such as cars and locomotives) in Iowa and other areas where they do not compete with the merged company to develop a competitive edge in these areas.

BN finally points out that the problems of ICG, CNW, Rock Island, and Milwaukee Road do not stem from the merger, and that

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[42] *Penn Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 500 (1978).
[43] *St. Joe Paper Co. v. Atl. Coast Line R. Co.*, 347 U.S. 298, 312-321 (1954).

the standard for judging the proposed merger is not the revitalization of bankrupt or marginal railroads.

Illinois Department of Transportation

The IL-DOT notes that the parties to this proceeding account for a significant portion of the rail system in Illinois. BN and protestants ICG, CNW, Rock Island, and Milwaukee Road account for over half of the total rail mileage and the greater portion of light density rail mileage in Illinois. Frisco, while not directly serving Illinois, serves St. Louis on the southwestern Illinois border. IL-DOT suggests: that Illinois' pattern of development was shaped overwhelmingly by its rail system; that a mutual dependence exists between the Illinois rail system and present Illinois economic activities, including agriculture, manufacturing and coal; and that the present system represents the level necessary to sustain the current level of economic activity within the State.

IL-DOT's prime concern is retaining rail service within the State. It claims no particular interest in the corporate entities which provide that service. However, an economically viable private sector rail system is necessary. Railroads seeking to operate high-speed, high-efficiency overhead routes through Illinois without integrating local service into that system do not benefit Illinois.

IL-DOT has analyzed the various positions of applicants and protestants and drawn three conclusions. First, the negative impact of the merger will not be the decisive factor in determining the survival of the weaker midwest rail carriers, and applicants' arguments regarding the weakness of those carriers appear justified. Nonetheless, the merger will divert revenue and traffic away from the weaker carriers presently serving Illinois, which are ill-prepared to withstand this.

Second, IL-DOT doubts applicants' claims of improved service in Illinois. It is argued that applicants never linked their ability to provide continued and improved local service in Illinois with the likelihood of providing such service.

Finally, IL-DOT sees this merger as the first stip in a radical restructuring of the national rail system. Taken together with other mergers which IL-DOT feels will follow, the cumulative effect will be the elimination of the marginal midwest carriers. IL-DOT fears that Illinois may find itself served only by transcontinental and north-south through routes which are not dependent upon, or interested in, local service to Illinois.

OTHER PROTESTANTS

Kansas City Board of Trade

The KC Board has requested that its conditions (in appendix K) be imposed if the merger is approved. It believes the conditions approximate the standard routing conditions and that it is beneficial to retain existing routes and transit on grain and grain products at Kansas City.

The KC Board does not believe BN should be permitted to insert a lower single-line rate between Kansas City and the gulf; all routes should be available. It also believes Frisco's current transit arrangements should be protected so that no rate penalty is incurred on outbound traffic after the merger.

Montana Wheat Research and Marketing Committee

MT-Wheat opposes the merger unless conditions to strengthen BN's competitors in the Northwest are imposed.

MT-Wheat perceives weak intramodal competition in the Northwest. It believes that Milwaukee Road should be provided with lucrative trackage rights to foster intramodal competition. MT-Wheat states that the public interest requires that Milwaukee Road be assisted at every turn so that it may reasonably rationalize its plant, reorganize its debt, restructure its competitive posture in the market place, and rehabilitate its remaining plant so that it may become a viable, privately owned, class I railroad.

Car supply is also very important to MT-Wheat. It believes the merger will worsen the car supply problem in Montana, and that this is contrary to the public interest, which requires that transportation service after the merger be on a par with existing service.

John W. O'Neil

John W. O'Neil contends that the proposed merger is not just and reasonable to Frisco stockholders because Frisco's controlling stock ownership interest in New Mex was undervalued. Mr. O'Neil notes that Frisco's New Mex stock was valued at $14,211,639 as of December 31, 1976. Since that time, New Mex stock has split two-for-one.

Mr. O'Neil estimates New Mex's fee-owned land and improvements are worth $70 million, based on the ownership of

497,700 acres of land in fee, including mineral rights in all but 660 acres, and 850,000 acres of mineral rights on land in New Mexico and Arizona. A 1970 study estimates that 4,000 to 5,000 acres will lend themselves to future commercial or industrial uses. Although land subdividers in New Mexico have increased the value of raw land beyond its worth for cattle grazing, New Mex has agreed to sell 20,770 acres, less mineral rights, for $50 an acre. Improved properties include an apartment complex in Flagstaff, AZ, three conveninence markets, a distribution center, an outlet and lapidary shop for petrified wood in Phoenix, and a retail store near the Petrified Forest National Park. In addition to the value of the real property, Mr. O'Neil contends that New Mex income from minerals on its properties amounts to $492,800,000 and the company's total income amounts to $562,800,000.

He urges the Commission to require an independent valuation of the assets and land holdings be made (at Frisco's expense) and an adjustment of the merger terms to take into account the true value of New Mex. Alternatively, he urges the Commission to order Frisco to spin off its holdings in New Mex to the Frisco shareholders.

BN and Frisco point out that the stock exchange was negotiated at arm's-length and overwhelmingly approved by shareholders. Applicants point out that they were valued without regard to their natural resource holdings. Applicants conclude that the stock exchange is fair and not contrary to the interests of Frisco's stockholders.

Mr. O'Neil notes that the appraisers, in their letter to Frisco of March 28, 1978, do not state that they have made an evaluation either of New Mex or of Frisco's stock interest in that company. He contends that approval of the proposed transaction was voted by Frisco shareholders without knowledge of the true value of Frisco's interest in New Mex.

EMPLOYEE ORGANIZATIONS

Railway Labor Executives' Association

The Railway Labor Executives' Association (RLEA) believes the merger is contrary to the public interest because its benefits can be obtained through other means, such as run-through trains, and it is motivated by self-interest instead of the public interest. RLEA opposes the merger, but asks for specific provisions for the protection of railroad employees if the merger is approved.

RLEA believes that employees of competing railroads will be affected more than BN-Frisco employees, principally as the result of traffic diversion (fully discussed in appendix H). When an employee of another railroad is furloughed because of the merger, RLEA believes the merged company should protect employees. RLEA contends that railroad employees should be treated the same if affected by the same event, regardless of the employer. It points out that the Commission has recently provided this type of protection.[44]

RLEA argues that a total of 565 positions will be abolished in the first 3 years after merger, with major impacts at Kansas City (78 positions abolished), St. Louis (147 positions abolished), and Springfield, MO (144 positions abolished).

With this major impact on employees, spread over such a large geographic area, RLEA believe believes that expanded employee protection, should be imposed on the merged company. One element RLEA considers vital is a requirement that implementing agreements be reached before changes can be made.

BN and Frisco argue that employees of other carriers will not be greatly affected. They point to evidence submitted by 10 carriers indicating no impact on employees from the merger, compared to four that have tenuous claims of harm to employees. They argue that overriding policy militates against this protection because of the enormous costs to applicants, the impossibility of determining which employees were affected by the merger, as opposed to other causes, and problems in administering the protection.

RLEA states that to require the employee to prove that he was adversely affected solely by the merger, instead of permitting the employee to prevail by showing that the merger, as well as other factors, affected him is less protective than than the current standard.

RLEA has also suggested changes in the standard employee protective conditions found to be required in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 354 I.C.C. 399 (1978).

RLEA argues that: article I, section 1(c) must be modified to protect an employee from being required to relocate his residence; article I, sections 1(d), 8, 9, and 12 must be modified to extend protection without limitation to an employee's length of service; and article I, section 9 must be modified to relieve the employee of a 3-day limitation for travel and actual wage loss time after travel.

[44] Finance Docket No. 28499 (Sub-No. 1), *Norfolk and Western Railroad Company and Baltimore and Ohio Railroad Company—Control—Detroit, Toledo and Ironton* (not printed), decided July 23, 1979.

RLEA has also suggested other modifications to the protective condition.

Applicants' initial response to these arguments is that because the merger will result in a net increase of 248 positions, stringent labor protection is not required. Specifically, applicants argue that requiring a dismissed employee to accept new employment opportunities, even if he has to change residence is not harsh or unconscionable, but is supported by the policy that a change of residence is more beneficial than having an idle employee drawing full benefits while the carrier must pay a new-hire or unprotected employee to fill the available job.[45]

United Transportation Union

John W. McGinness, Illinois Legislative Director of the United Transportation Union (UTU-IL) opposes the merger. He believes it will adversely affect railroad employees in Illinois because: it would shift traffic from the St. Louis-East St. Louis gateway to the Kansas City gateway, resulting in a reduction of movement via Beardstown, IL, and a reduction in employment at Beardstown; it would shift BN acquisition of steel rail from mills at Gary, IN to Birmingham, AL, reducing traffic through Illinois; it would reduce traffic between Beardstown, IL, and Paducah, KY, between Shattuc and East St. Louis, and West Alton and East St. Louis; and it will eliminate two trains operating between Galesburg and Centralia, IL.

UTU-IL also believes the merger will trigger other mergers. Therefore, the Commission should await development of records in all other rail consolidations in order to be able to measure the total impact of these consolidations on railway labor.

M. S. Stuckey, General Chairman of the United Transportation Union on the Illinois Central Gulf Railroad Company (UTU-ICG) opposes the BN-Frisco merger because of losses of traffic and revenue projected for ICG. UTU-ICG also opposes the merger movement in general and believes the Commission should await and consider all rail consolidation proceedings before rendering a decision on this merger.

UTU-IL and UTU-ICG argue that the Commission's general policy statement[46] has prejudged this merger. They argue that end-to-end mergers are inconsistent with congressional directives since

[45]Report to the President by Emergency Board No. 188, appointed by Executive Order 1209, September 28, 1978 to investigate a dispute between the N&W and certain of its employees, December 15, 1978, pp. 17-18.

[46]*Railroad Consolidation Procedures*, 359 I.C.C. 195 (1978).

Congress created Conrail out of a number of parallel lines and rejected the opportunity to create end-to-end systems involving the lines of the bankrupt railroad in the Northeast. UTU-IL and UTU-ICG do not believe that we should encourage the rationalization of rail facilities and the reduction of capacity, particularly in western regions in light of growing traffic.

UTU-ICG also opposes the various trackage rights proposals, especially ICG's between Memphis and Birmingham. It argues that ICG's proposed trackage rights do not offset the adverse effects of the merger, but merely compound employee relocations created by the merger and increase the adverse effect of the merger on employees. It points out that although 29 positions would be added at Memphis, 16, 12, and 8 positions would be abolished at Haleyville, Jackson, and Memphis, respectively. It states that the impact on employees at Haleyville will be particularly severe because these employees would be unlikely to relocate.

UTU-ICG's objection is based on: a reduction of crew changes between Memphis and Birmingham from four to one; a reduction of switching work at Jackson, TN; and the uprooting of employees and their families that would occur if they were to follow their work from Fulton, KY, to Birmingham.

According to UTU-ICG, the congressionally mandated employee protective conditions are insufficient.

M. M. Winter, General Chairman for the United Transportation Union on BN and speaking also for Frisco employees (UTU-BN) opposes the merger. He argues that because of the financial health of BN and Frisco, merger is not necessary to insure their survival. Further, the merger and predicted diversions of traffic and revenue would result in the financial ruin of Milwaukee Road, CNW, MKT, ICG, Rock Island, and KCS.

Although UTU-BN requests that the merger be denied, it believes that the employee protective conditions imposed in the *Northern Lines Merger* are adequate and should be imposed on this merger. The argument is made that the conditions were intended to extend to the employees of other carriers included in the BN.

BN argues that the BN-Frisco merger does not involve the inclusion of another carrier in the *Northern Lines Merger* as envisioned in that case. Further, the specific labor protection agreement imposed should be limited to that case, where severe adverse impacts on employees (net loss of 5,200 jobs) were expected, while the BN-Frisco merger anticipates a net increase of 248 jobs.

Railway Employees' Department, AFL-CIO

RED opposes the merger, contending that hundreds of employees will lose their jobs while several thousand will be adversely affected in some way (including transfers requiring changes of homesites).

RED urges the Commission to consider the impact on employees, their communities, and their families. It also questions why the benefits from the merger cannot be obtained without merger, and points out that the morale of employees must be considered.

RED proposes that the merger be denied as not consistent with the public interest. If the merger is approved, RED requests the imposition of appropriate protective conditions.

ENVIRONMENT

As part of their application, applicants submitted a Detailed Environmental Impact Report (DEIR), analyzing the environmental impacts of the merger. It was not necessary, nor was it appropriate, for the DEIR to go beyond the environmental and energy impacts of the merger. Comments on other impacts in a DEIR are merely editiorial. They are unnecessary and irrelevant to the proper scope of a DEIR.

The DEIR indicated that the origins and destinations on the BN and Frisco will not change. However, BN will receive an additional 165 carloads per day from Frisco and Frisco will receive an additional 358 carloads per day from BN. The report focused on nine routes that are anticipated to experience changes of two or more tains per day and eight terminals which are expected to experience changes of more than 200 cars per day.

The environmental impacts discussed in the DEIR include impacts on noise, energy, safety, air, water, historic, scientific, and cultural resources, socioeconomics, coal movements, land use, and ports.

The DEIR indicates that the effect of the overall transaction generally is positive. It points out that the changes in fuel consumption and associated air emissions, along with minimal changes in generation of wastewater and noise, are entirely related to increased freight traffic derived from other lines. While these changes may have a negative impact at line segment level, they mirror changes on other rail lines due to a loss of the traffic. The DEIR also points out that unification of management resulting from

the transaction may be a significant factor in mitigating many of the minor additions to emission or discharge levels.

The DEIR indicates that employment changes are not of a significant magnitude when compared to the employment structures of the communities in which the employment changes will occur. It further states that these employment changes will be mitigated through employee protective agreements.

The DEIR indicates that the merger is maximizing the commitment of short-term uses of man's environment already made and will not commit previously uncommitted resources. It also points out that the very low levels of added air emissions along some routes are balanced by decreases along other routes. The DEIR concludes that no irretrievable or irreversible commitment of new resources is involved.

The impacts of the merger are judged to be negligible when viewed from a regional and national viewpoint. Even on a local level impacts are insignificant. None of the study routes or study terminals would experience increases in noise, air emissions, or water discharges than can be identified as significant. Minor changes will occur, but the largest increments lie in the reduction of noise and air emissions at St. Louis and Kansas City. The DEIR concludes that the merger can be effective without significant environmental impact.

The Energy and Environment Branch (E&E) of the Commission's Office of Policy and Analysis prepared a Draft Environmental Impact Statement (DEIS) in this proceeding, which was served on December 29, 1978. A Final Environmental Impact Statement (FEIS) was prepared incorporating the DEIR, the DEIS, cross-examination on the DEIS, and comments on the DEIS. it was served October 19, 1979. E&E reduced the scope of the environmental and energy analysis of the merger. This was done by analyzing only the daily changes of two or more trains on a route or 200 or more cars in a yard. We expect equivalent or greater scoping of this type of transaction in the future. E&E is to be complemented for this approach.

The FEIS analyzed the proposed impacts of the merger and the impact of the different alternatives to the merger. We will not repeat the detailed analysis here, since it has been served on all parties to this proceeding. We will only summarize the conclusions.

The merger is not expected significantly to affect energy. On the routes where train traffic increases, there will be an adverse but not

severe impact upon air quality and noise levels. The total possible reduction in railroad employment is insignificant when compared to national employment. Specific local employment reductions are not significant in relation to total employment in local geographic areas. The merger is not expected significantly to alter water quality, the terrestrial environment, or historic sites.

The FEIS addresses adverse impacts which cannot be avoided. Such impacts include: (1) localized minor increases in noise intrusion; (2) emission of air pollutants along study routes and at study terminals which will receive an increase in traffic; (3) minor increases in potential rail derailments from increased traffic on some study routes resulting in spillage of hazardous materials; (4) reduction in some communities of employment by the merged system; and (5) a possible increase in safety hazards at rail grade crossings along lines which incur additional traffic.

The only long-term impact caused by the merger results from the increase in fuel consumption leading to the reduction of the long-term supply of energy. However, this increase in fuel consumption is *de minimus*. The effect in the long term on the air quality will be negligible, while no long-term effects are anticipated for noise levels since the additional noise intrusions do not significantly change existing conditions.

Hence, the merger will have minimal impacts on the environment. In certain instances the merger will have beneficial effects, while the adverse effects are widely dispersed and nearly negligible.

MERGER CRITERIA

Congress has directed us to approve and authorize a merger of rail carriers when we find the transaction is consistent with the public interest.[47] In examining the public interest, we are required to consider a wide range of factors including, but not limited to, (1) the effect on the adequacy of transportation to the public, (2) the effect of including, or failing to include, other rail carriers in the area involved in the proposed transaction, (3) the total fixed charges that would result, and (4) the interest of affected carrier employees.[48] We also must scrutinize any resulting guaranty, assumption of payment of dividends or of fixed charges, or increase in total fixed charges.[49]

[47] 49 U.S.C. 11343(a)(1) and 11344(c).
[48] 49 U.S.C. 11344(b).
[49] 49 U.S.C. 11344(d).

The public interest criterion draws its content in large part from the national transportation policy.[50]

(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

No plainer statement of overall congressional intent appears than: "Title IV of this bill is intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system."[51]

Highly pertinent to our examination of the public interest under the statute are the policies embodied in the antitrust laws, particularly section 7 of the Clayton Act which proscribes certain anticompetitive acquisitions.[52] The Commission is not obligated to measure proposals for consolidation by the standards of the antitrust laws[53] and need not—and, indeed, should not—sit as an antitrust court in determining compliance with the Clayton Act.[54] The Commission, after all, is empowered to disapprove mergers which would comply with antitrust notions, and perhaps more importantly, approve mergers even if they would be inconsistent with the antitrust laws. Nevertheless, the Commission, like other regulatory agencies, has long been required to consider anticompetitive

[50]49 U.S.C. 10101(a).

[51]Railroad Revitalization and Regulatory Reform Act. (4R Act) Legislative History, Public Law 94-210, p. 34.

[52]Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, provides in pertinent part: "No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital *** of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."

[53]*McLean Trucking* v. *United States*, 321 U.S. 67 (1944).

[54]*Northern Lines Merger Case*, 396 U.S. 509, 514 (1970).

consequences as part of its broad public interest statutory mandate. See *Denver & R.G.W.R. Co.* v. *United States*, 387 U.S. 485 (1967). We need only consider anticompetitive consequences as one of several factors which must be examined, no one of which must necessarily control in the circumstances of every case. On the other hand, we believe that antitrust factors have a special place in our analysis. As the Supreme Court has observed, the antitrust laws give "understandable content to the broad statutory concept of the 'public interest.' " *FMC* v. *Aktiebolaget Svenska America Linien*, 390 U.S. 238, 244 (1968).

In this connection, our recent policy statement particularized numerous public interest criteria to be considered, as follows:

> (1) Whether essential rail services will continue to be provided, either by the consolidating companies or by other railroads which may be affected by the consolidation ("essential services" include, but are not limited to, those required by the national defense and those shown necessary to achieve other established national goals, such as energy conservation and rural and community development);
> (2) Whether opportunities to achieve operating efficiencies will be increased;
> (3) Whether redundant facilities will be eliminated;
> (4) Whether the ability of the consolidated system to attract new business will be enhanced;
> (5) Whether the consolidated company will be financially viable;
> (6) Whether effective inter- and intramodal competition will be maintained wherever economic realities make it possible; and
> (7) Whether there will be any adverse impact on the environment of the region served.[55]

When we approve a merger, we may impose conditions.[56] The merging carriers are required to provide a fair arrangement for the protection of affected employees so that the employees will not be in a worse position related to their employment.[57] Concerning maintenance of routes and channels of trade, protection of operating relationships between competing railroads, and similar matters, we have broad discretionary powers to subject a proposed merger to such terms, conditions, and modifications as we find to be just and reasonable.

Our statutory authority to impose such conditions is not limited to conditions proposed or favored by the carriers.[58] In this regard the Commission has imposed, in almost every merger or consolidation

[55] *Railroad Consolidation Procedures*, 359 I.C.C. 195, 199 (1978).
[56] 49 U.S.C. 11344(c).
[57] 49 U.S.C. 11347.
[58] *Illinois Cent. Gulf R.—Acquisition—G., M. & O., et al.*, 338 I.C.C. 805, 844 (1971) and *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 128 (1963).
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transaction approved over a period of almost 30 years, some modification or variation of conditions that require applicants to keep open all routes and channels of trade via existing junctions and gateways; maintain neutrality in handling traffic so as to permit equal opportunity for service to and from all lines reaching the rails of the merged company without discrimination; continue existing traffic and operating relationships in effect between the merging companies and all connecting lines; handle all traffic without discrimination as between competing carriers in promptness or frequency of service; and forego any restraint or curtailment of the right of industries located on the lines of the merged carrier to route traffic over any or all existing routes and gateways (the standard traffic conditions).[59] The genesis of these conditions was in the 1920's.[60] It is sufficient to note at this point that of the protective conditions involved in these proceedings, only labor protection is provided on the basis of explicit provision in the statute. All other conditions must find some basis in our general mandate to impose conditions governing the transaction, or in the specific considerations enumerated.

In sum, we have examined the total transportation factors and conclude that there are substantial transportation benefits flowing from the merger of BN and Frisco. In our analysis, we have considered the competitive aspects in light of the policies underlying the antitrust laws. We find that the merger satisfies the public interest test of the act.

DISCUSSION

We begin the decade of the 1980's faced with an economy suffering the ravages of inflation and an uncertain future as to the reliability of our energy resources. The Interstate Commerce Commission cannot cure these problems. However, our decisions regarding surface transportation can incrementally reduce these problems. A basic ingredient in the price of all goods is transportation, and a basic ingredient of our Nation's transportation system is energy.

When carrier operations can be made more efficient and less costly without disrupting essential services, it is in the public interest to approve the result. In this manner our national economy

[59] *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492-493 (1950).

[60] *Chicago Junction Case*, 71 I.C.C. 631 639-641 (1922); *St. Louis S. W. Ry. Co. Control*, 180 I.C.C. 175, 206 (1932); and *Southwestern Lines Unification*, 124 I.C.C. 401, 439 (1927).

can benefit from the efficiencies and cost reductions through either price reductions or a forebearance to raise prices.

The merger of Frisco into BN presents us with just such an opportunity—two railroads voluntarily initiating a transaction that will reduce their costs and improve utilization of equipment and facilities without eliminating essential services.

We find the merger consistent with the public interest, subject to the condition in appendix M. The issuance of stock and the assumption of Frisco's obligation or liabilities by BN, and control of FTC by BN, are also approved. We will address each of these factors separately.

Merger

We have weighed the benefits of this merger to applicants and shippers versus the injury to other railroads and found the public interest considerations favoring the applications.

Adequacy of transportation.—Approval of this merger, as conditioned, will have a beneficial effect on the adequacy of transportation to the public. Not only will the services of the merged company be significantly improved, but other railroads will be able to continue providing essential services. The merged company will be able to provide new single-line service, reduced transit times, more efficient and frequent service, and improved car utilization.

Single-line service will be available between the gulf coast and the Midwest and Northwest. This new service will be available between Seattle, Portland, and Vancouver, on the one hand, and Birmingham, Memphis, and Mobile on the other. Another direct route is between Minneapolis-St. Paul, Duluth-Superior, and Chicago, on the one hand, and, on the other, Tulsa, Oklahoma City, Dallas-Fort Worth, and Houston. Preblocked trains will be able to move over long distances without interchange and with minimal switching. The elimination or reduction of switching or interchange at Kansas City and St. Louis will also save time and resources in carrying freight.

Shippers support this merger because reduced transit time, ease of tracing shipments, control of loss and damage, possible expansion into new markets, and improved car utilization and availability will result from the new single-line service that will be available after the merger. When shippers who spend billions of dollars annually

for transportation services state that a service created by a merger will benefit them, we must weigh such evidence heavily in our decisionmaking process.

Railroads compete with each other for the longest haul and maximum revenue on traffic. At the same time they must cooperate when and where traffic is interchanged. Because of this "Balkanization" of the railroad industry, BN and Frisco independently have not taken steps to develop single-line service or innovative rates. Since railroads compete for any traffic that can be handled by more than one railroad, railroad management should not be expected to sacrifice potential revenue on which that railroad's facilities and investors could rely. Without a merger this single-line service could not be provided without bringing into question management's duty to investors and the public.

A direct result of single-line service will be faster transit times (*e.g.*, transit time between Minneapolis and Memphis will be reduced by 49 percent, from 94 hours to 49 hours) due to reduced intermediate switching. With reduced switching, handling of shipments and incidental loss and damage also will be reduced.

Freight car and locomotive availability on the merged BN will improve because of: a combination of both fleets, resulting in 131,358 freight cars and about 2,824 locomotives; better utilization of equipment because of faster transit times and the inapplicability of car service rules;[61] and use of standard fleet management maintenance policies. In order to manage its car fleet, the merged company will use a computerized information system for centralized freight car location and distribution. This will allow BN expeditiously to inform a shipper of the location and delivery date of his shipment and efficiently to match-up the supply of available empty freight cars with shipper demand.

Freight car utilization is an extremely serious problem facing the railroad industry. The current environment in which railroads operate results in the inefficient use of cars.[62] This in turn results in higher rates to improve a poor return on investment for the cars. We have tried to use artificial prodding to increase the utilization and turnaround time for cars.[63] Action by the railroad industry which can increase car utilization and availability is in the public interest.

[61] BN-Frisco estimate elimination of over 5 million empty car-miles annually.

[62] Sixteen percent of time in movement and 24 percent empty. Seminar by Dr. J. M. Sussman, Massachusetts Institute of Technology, Center for Transportation Studies, Freight Transportation Program (August 18, 1977), "Railroad Reliability and Freight Car Utilization: An Introduction" (M.I.T. report No. CTS 75-8).

[63] *Car Service Compensation—Basic Per Diem Charges*, 359 I.C.C. 138 (1978).

The merged company will provide more frequent service for shippers in major traffic corridors by increasing the net number of trains operated daily.[64] Between points on the merged system, traffic will follow the shortest and most expeditious route instead of the longest route within each system, as is now done. The merged company will also have greater flexibility to reroute traffic to avoid delays or interruptions on its system.

A function of adequate transportation service to the public is the ability of a railroad to maintain its facilities. BN and Frisco currently do not have, and do not anticipate any diffuculties in maintaining their facilities. The merged company will present an attractive target for investment. Thus capital should be available to finance necessary improvements to maintain its facilities.

Once the merger is fully consummated, BN will have additional net income of about $33 million annually. This too will strengthen the merged company and make it attractive in the capital markets. This increased net income is composed of $20,303,549 in net operating savings and $16,856,314 net income from diverted traffic (less employee protection costs of $4,638,597).

The operating savings will come from: (1) eliminating independent operations at the common points of Kansas City and St. Louis (including facilities, equipment, and manpower); (2) combining the overhead functions of BN and Frisco; (3) increasing car utilization and thus operating efficiency; and (4) unifying maintenance of roadway, locomotive, and freight equipment.

The financial stability posited by the merged company was supported by shippers (including Weyerhaeuser, Shell, and Amax)[65] and DOD.

Contrary to these bright expectations, Rock Island indicates that no redundant plant will be eliminated, except at the common points of Kansas City, St. Louis, and Dallas-Fort Worth. No abandonments are contemplated as a result of the merger because facilities are not duplicative except at the connecting points. At Kansas City and St. Louis the merged system would reduce redundant facilities, equipment, and personnel. Rock Island's argument ignores the facts of this particular merger, but instead looks back to past mergers of different configurations.[66]

[64] Twelve new trains will be added daily by applicants, while four presently scheduled trains will be removed.

[65] See appendix C.

[66] See generally *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 (1966); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967); and *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963).

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Katy argues that the merged company's increase in net income from operational savings is not a benefit. This argument ignores the financial malaise of the railroad industry. Any cost savings will benefit not only an individual railroad, but the industry as a whole and the public. A savings of over $20 million is sorely needed relief. Even if we were disposed to condition this merger so that no traffic diversion would occur (which we are not, since we believe that lower rates and improved service resulting from increased competition benefit both the railroads and public), the benefit from cost savings is substantial and beneficial. The savings of over $20 million is nearly 25 percent of the 1976 combined net income for BN and Frisco.

The merger will open the southeastern and southwestern Sunbelt growth areas to BN through improved single-line service. This should enable BN customers to develop new markets for such raw materials as coal from the Powder River Basin.

The merger will also make BN a competitive force in the north-south corridor between the Great Lakes and Canadian border and the gulf coast. Currently to reach the gulf from the eastern portion of its system, BN routes via Denver and then south along the C&S and FW&D. The addition of Frisco will permit direct, competitive, single-line service by eliminating circuity.

Frisco will benefit from the merger by becoming part of an originating and terminating carrier, instead of relying greatly on intermediate or overhead traffic. The merger also will expand Frisco's financial base and insure that funds are available for maintenance of facilities and equipment. Additionally, Frisco will have access to major new markets in the Midwest and West for the shippers it currently serves in the Sunbelt. This new single-line service from the Sunbelt through the North and Northwest will expand marketing potential for commodities developed in the Sunbelt.

The protestants to this merger generally argued that it is solely a merger for profit and that they will be significantly injured in the event the merger is approved and protective conditions not imposed.

To begin with, the statute does not require that we approve only consolidations between weak and strong carriers, but permits mergers between strong carriers. It is not necessary for a railroad to be a failing company before its merger into another railroad can be

approved.[67] This merger may be approved, as the Commission has ruled in the past, if it is consistent with the public interest. If the merger is in the public interest, the applicants have a right to its approval.[68] Hence, protestants' opposition to the creation of a financially strong carrier is unfounded.

Additionally, protestants argue that the diversion of traffic to the new merged system is an invasion of territories which will result in a decreased rate of return for these companies and underutilization of their facilities. We must point out that a railroad has no proprietary right to carry traffic. For that matter, the statute[69] clearly gives shippers the right to route traffic. Shippers may opt for a service which is more efficient and possibly more economical. Because protestants do not believe that they can meet the competition is not a valid reason for us to find a merger not in the public interest.

A domino type effect from a merger of this sort is not necessarily contrary to the public interest. Indeed, where rail carriers are forced to look to rationalization, operating efficiencies, elimination of redundant facilities, and improved service through some form of consolidation or restructuring to continue essential services, the public interest can only benefit.

Clearly, the merger will heighten intramodal competition. The ability of the merged company to provide service from the Northwest and Central States into the Southeast and portions of the Southwest in single-line service with limited interchanges will increase the shippers' options for type of service and probably the cost of service.

The merged company will provide strong competition to other railroads in all markets where they compete. These companies will be required to improve service or face a situation where certain service is no longer essential since it is being performed by the merged and other competitive companies. We look for this new intramodal competition to result in innovative rates and service improvements for the benefit of the shipping public.

Although BN and Frisco are not able to quantify new business resulting from intermodal competition, the ability to provide expeditious single-line service between the Northwest and the Sunbelt, resulting in reduced cost of operation and possibly reduced freight rates or foregone freight rate increases, along with improved

[67] See *Florida East Coast Railway Co. v. United States*, 259 F. Supp. 933, 1010 (1966) and *Louisville & N. R. Co.—Merger—Monon Railroad*, 338 I.C.C. 134, 141 (1970).

[68] See *Id.*, and *Pennsylvania R. Co.—Merger—New York Central R. Co.*, *supra* at 498.

[69] 49 U.S.C. 10707.

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car supply, will make them a strong intermodal competitor. Carriers connecting with BN should also benefit from this increased intermodal competition since the merged company would have to interline a large amount of traffic with other railroads in order to provide door-to-door rail service for a number of customers.

One of the major benefits from this merger will be a reduction in the number of currently interlined shipments. Interchanging traffic adds to the total cost of handling traffic, including operational cost (car-switching) and clerical cost (recordkeeping). Interchanging freight also adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars. Superior service should not be penalized because weak carriers cannot meet the competition.

Another benefit to shippers would be the ability to control and trace shipments through one railroad where the shipments are being handled in single-line service. Shippers are attracted to a sole source of carrier responsibility for loss and damage, along with single carrier responsibility for expediting shipments when necessary.

The merger presents the opportunity for innovative ratesetting. Standing alone, a bridge carrier like Frisco has neither the financial ability nor sufficiently long hauls to take these actions on a scale equivalent to that of the merged company. However, in conjunction with BN, Frisco will create a new system with financial strength, long hauls, a great proportion of origin and destination traffic, and access to numerous gateways. A company of this size can initiate imaginative or aggressive pricing.

The merger will also result in improved utilization of physical assets. The merger itself will not require a substantial investment of capital, since only 55 locomotive units and 17 cabooses need be added to accommodate the anticipated traffic increase. Savings from unifying terminal facilities at the congested rail centers of Kansas City and St. Louis will be substantial. They will also serve to eliminate delays that currently occur at interchanges at these two points. The merged company will also be able to provide coordinated train schedules, yard consolidations, preblocking, and creation of new run-through train service to alleviate congestion at Kansas City and St. Louis on traffic bound to points on the extremities of its system. This type of consolidation rationalizes facilities without straining management or capital.

None of the shippers served currently by BN or Frisco will lose service. Additionally, despite protestants' somewhat exaggerated

claims, no competitor of BN or Frisco will be eliminated as a result of the merger. Competition will be enhanced by carriers willing to go the extra mile to show shippers that their service is or can be as good as that of the merged company. Protestants are advised that those cars of theirs which they will not be using to transport traffic diverted to the merged company should be used on other portions of their system where they can compete for traffic and help to alleviate periodic car shortages. If a carrier meets the request for cars in a year, and then because of a merger found that some of its cars were no longer required by shippers, it could use those cars to fulfill the needs of the shippers which had not previously been able to utilize rail service. Here, the protesting carriers would not only be using their assets to obtain revenues which they thought were lost to the merger, but they would also be increasing intermodal competition since we must assume that the goods they could not transport were transported by some other mode.

Thus, the merger meets the statutory criterion of adequate transportation service to the public.

The competitive impact of the proposed merger.—In determining whether a merger is in the public interest, we are required to consider the competitive aspects of that merger.[70] DOJ has provided us with a workable framework. Although we believe DOJ should have given more careful consideration to the record in this proceeding, and determined and explained which estimates of lost traffic it would use—applicants or protestants—the methodology it proposed has some purpose, and we expect parties to address this in future proceedings.

Appendixes D, E, and J and portions of this report detail the operations, traffic flow and financial status of applicants and several of the protestants. Appendix H sets forth our analyses of the traffic diversion studies, each of which deals with the competitive impact of the proposed merger. Collectively, these analyses address the relevant market competition as it presently exists and as it potentially will be changed by the merger.

Approval of this merger will not adversely diminish competition. Clearly, BN is a principal competitor in the western district, with a route structure permitting it to compete vigorously for transcontinental traffic moving eastward and westward through the northern and central corridor, particularly for traffic originating or terminating in the Northwest and western Canada. Much, if not most

[70] See *Northern Lines Merger Cases*, 396 U.S. 491, 511-513 (1970).

of this traffic has its origin or destination in the eastern and southern districts and moves via the Chicago, Centralia, Woodlawn, St. Louis, Kansas City, Twin Cities, Denver, and Grand Island gateways in connection with carriers serving routes east of BN's lines (with the exception of Grand Island and the gateways where the principal connecting carriers for east-west traffic are the UP and the D&RGW, respectively).

BN is also a major competitor for Northwest traffic moving to and from California (via Bieber, Klamath Falls, or Portland) and the South-Central States via subsidiaries C&S and FW&D. BN also is a major competitor for bridge traffic moving between midwestern Canada and the North-Central States, on the one hand, and the Southwest on the other. This traffic moves as bridge traffic in large part between BN's Twin Ports and Twin Cities gateways on the north and the carrier's gateways in Illinois and Missouri on the south. This corridor also handles considerable traffic to and from western Canada on which CP or CN take prior or subsequent long hauls to or from the midwestern Canada border gateways.

Frisco is unique among midwestern railroads in that it crosses the Mississippi River, penetrating deep into the Southwest and the South-Central States, while also serving the important Kansas City, St. Louis, and Memphis gateways. Although highly dependent on interline traffic, it has been competitive by virtue of its strategic route structure and well maintained and managed plant, equipment, and operations. The strategic value of Frisco's route structure results from the fact that it can actively participate in virtually all traffic corridors except the central and northern corridor traffic moving between the Northeast on the one hand and the Northwest on the other. In short, Frisco's principal routes lie in traffic corridors reaching diagonally across the United States, east and west across the Sunbelt and between the North-Central States and the Sunbelt.

As DOJ points out in its brief, the proposed merger is a classic example of an end-to-end unification; at no point do the BN and Frisco lines overlap. Frisco, however, does possess a circuitious route between Kansas City and St. Louis via Fort Scott and Springfield, which duplicates to a limited extent the less circuitous more northerly BN route via Hannibal, MO. While the proposed merger would thus eliminate the competing line between Kansas City and St. Louis, no party has claimed that there would be an adverse diminution of competition between the two points. Indeed, this route is also covered by lines of N&W, Rock Island, ICG, Mopac, and MKT (circuitously).

Technically, one other route is duplicated by BN and Frisco lines—the route from Dallas-Fort Worth to Kansas City and St. Louis. BN's route, however, is extremely circuitous, since shipments must move via Denver. An insignificant amount of traffic moves over this route. Obviously, the Frisco route, when merged into the BN system, will provide the unified company a highly competitive single-line route between the North-Central States and Texas which potentially obviates existing BN movements via Denver.

We also conclude that this merger will not have any appreciable impact on future competition because there is little likelihood that either carrier would independently seek to compete with the other. In end-to-end rail mergers, such as this, potential entry is not a factor. Construction of this new rail line by BN or Frisco to enter the other's territory and compete is prohibitive because of the time, expense and resulting duplication of facilities. The only other method to extend one railroad's lines into another's territory is through agreement between railroads. Hence, although joint use, joint ownership, trackage rights, or reciprocal switching are methods of potential entry, they are actions that cannot be taken unilaterally.

We believe that the merger will have some procompetitive effects. The potential merger benefits claimed by applicants are not questioned. Protestants in fact have based their cases on the belief that a merged BN-Frisco system would realize the benefits claimed. Significantly, all of the claimed benefits are of the type which will result in *increased* competition between the merged system and the protestants. Decreased competition and creation of monopoly conditions are not at issue.

The increased competition will result from the combination of BN and Frisco routes and existing traffic flows into a system which greatly increases the territorial penetration of both carriers. The traffic flows for BN and Frisco are complementary: each a natural extension of the other. It is not surprising that the protestants are those carriers (including those having reached stipulated agreements with applicants) which have routes paralleling routes of one or both applicants. These carriers in most instances have provided end-to-end interline service in connection with one applicant in competition with the other applicant. For example, ICG has provided interline service to and from Birmingham in connection with BN via the Centralia gateway in competition with Frisco and its connections (including BN). After merger, ICG's Centralia-Birmingham service will clearly face increased competition from single-line BN-Frisco routes to and from several geographic markets

formerly served by BN but not by Frisco. ICG will compete by connecting elsewhere with others.

We conclude that applicants after merger will have the *potential* to become much stronger competitively for traffic handled by other modes. It clearly is up to the unified management to take advantage of the potential. We consistently have encouraged the rail industry to be both more cooperative (*e.g.*, handling long-haul TOFC) and competitive (*e.g.*, providing comparable service) intermodally, and approval of the proposed transaction provides a major tool to achieve these goals, to the benefit of the merged company, its shippers, and other carriers both rail and nonrail.

Several railroads potentially impacted competitively by the proposed merger have entered into stipulated agreements with applicants. Details of these agreements are set forth in appendix K. Although these carriers have anticipated traffic diversion as a result of the proposed merger, they believe that they have adequately protected themselves from any increase in competition beyond that which normally can be expected in the marketplace.

The railroads which have remained as active protestants in these proceedings (Soo Line, Rock Island, Milwaukee Road, ICG, and Katy) fear the increased competition resulting from the proposed merger and have pressed strongly for protection from the impacts of the new competitive strength of BN and Frisco.

We will not protect impacted carriers simply because they find themselves in a situation where they must actively compete for traffic more strenuously. As stated in our policy statement, we look only to preservation of essential rail service when imposing protective conditions, not to the protection of corporate entities. We have found that no corporate entity will be so adversely affected by the merger that it will be unable to provide essential services. Affected carriers must compete more vigorously and develop new interline rates and services to meet the new competitive abilities of a merged BN-Frisco.

Inclusion of other carriers.—We are also required to determine whether or not to include other carriers in the territory in a merger.[71] No carriers have sought inclusion in the merged company. We conclude that inclusion is not necessary for this transaction to be consistent with the public interest.

Fixed charges.—We are required to determine the effect of total fixed charges that will result in the proposed transaction.

[71] See 49 U.S.C. 11344(b)(2).

Fixed charges resulting from this merger will increase by $6.04 million due to discounting of the principal amount of Frisco's debt and capitalized lease obligations to reflect current interest rates and the cost of acquiring 17 new cabooses. The discounting is merely an accounting function and will not result in any increase in cash payments. The new cabooses are necessary to handle additional traffic and are well justified in that regards. The slight increase in the additional cash payments resulting from the increase of fixed charges is minor. This is particularly true when compared to the benefits of at least $33 million in net revenue annually accruing to the merged company after the third full year of merger.

Stock exchange.—John W. O'Neil questions the fairness of the stock exchange because of Frisco's majority ownership of New Mex. Mr. O'Neil believes that the valuation by Frisco should have taken into account more than the book value. The stock exchange resulted from arm's-length negotiations by the applicants and reliance on expertise in the field of securities exchanges. We should also point out that the valuations of stock made for purposes of exchange excluded not only the land company, but also BN's numerous mineral and lumber holdings in the Northwest.

We must determine that the value of the stockholder's contribution to a merger was determined in accord with the "current worth" of his equity.[72]

We find that the exchange rate of stock between BN and Frisco is fair to the shareholders.

Environment.—The applicants and our staff's environmental assessment of the proposed transactions concluded that the transaction would be unlikely to affect significantly the quality of the human environment.

Essentially this proceeding involves the acquisition of one railroad by another. The operations of one railroad company over a particular rail line or facility are likely to be akin to that of another, and whether BN or Frisco operates a given rail facility is not likely to make any difference from an environmental standpoint. Of course, the proposed transaction may result in some shifting of traffic and facilities, but considered over the entire affected region, the cumulative impact would be negligible. For this reason we agree with the staff's assessment that this merger does not represent a Federal action significantly affecting the quality of the human

[72] *See Schwabacher v. United States*, 334 U.S. 182 (1948) and *Northern Lines Merger Cases, supra.*

environment within the meaning of the National Environmental Policy Act of 1969.

In end-to-end rail mergers potential entry is not a factor. Construction of new rail lines by BN or Frisco to enter the other's territory and compete is prohibitive because of the time, expense and resulting duplication of facilities. The only other method to extend one railroad's lines into another's territory is through agreement between the railroads. Hence, although joint use, joint ownership, trackage rights, or reciprocal switching are methods of potential entry, they are actions that cannot be taken unilaterally.

Employee protection.—Since we have decided to approve the merger, we must consider the interest of, and provide protection for, carrier employees. We must determine first, what level of protection should be provided, and second, which employees should be protected.

This merger will provide a long-term benefit to employees of BN and Frisco by increasing the number of positions on the merged system. The applicants acknowledge that there will be short-term dislocations on their system. We must protect employees from these dislocations. Three alternative protective conditions which we might impose are: the standard protective conditions;[73] these minimum standards, with the amendments requested by RLEA (set out in appendix K); or the protection which BN and Frisco have negotiated with three other labor unions.

In the past we have imposed differing levels of employee protection for employees who reached an agreement for protection and those who did not.[74] We believe that this proceeding is also an appropriate place to bifurcate the levels of employee protection. Those parties who have negotiated agreements will be provided with that level of protection. Those who have not will be accorded the statutory standard. In so doing we reject RLEA's arguments that the standard we have developed is not in compliance with the statute.

In this case there is no basis for us to exercise our discretion and require a greater degree of employee protection than the statutory minimum. The impact on employees will be short term. In the long run employment on the merged system will increase by 248 positions. We reject the argument by RLEA that if there are only going to be short-term disruptions, applicants should be willing to accept maximum labor protection conditions. Applicants could be subjected to continual litigation and charges that the worsening of

[73] *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

[74] See *Norfolk and W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 50 (1964).

an employee's position, regardless of the cause, was due to the merger. Imposing the stringent protection RLEA requests could tie the merged system up in disputes for a long time when the *New York Dock* conditions are sufficient to protect employees.

The *New York Dock* conditions are significantly more protective of railroad labor than any previously imposed single set of employee protective conditions.[75] The *New York Dock* conditions satisfy the employee protection mandated by the statute. They will be imposed for the protection of employees who do not enter into a protective agreement with BN and Frisco prior to consummation of the merger.

We next turn to the agreements which were negotiated with the Brotherhood of Railroad Signalmen (BRS), Sheet Metal Workers International Association (SMWIA), International Association of Machinists and Aerospace Workers (IAMAW), and Brotherhood of Locomotive Engineers (BLE). These agreements are more protective than the *New York Dock* conditions and protect not only employees of BN and Frisco but also their wholly owned subsidiaries. The protective period is the same as in *New York Dock* or in the alternative, the period equal to length of service at the date of merger, with the protective period starting on the date of merger but no benefits to accrue until the employee is affected due to the merger. The displacement allowance is subject to a 6-year minimum.

For BLE the displacement allowance is a monthly allowance computed by dividing earnings from the last 12 months by the number of calendar days in the 12 months and multiplying that daily rate by the number of calendar days in the current month. These rates are to be adjusted for general wage increases, and reduced by any changes in laws or agreements which limit availability for work. Dismissal allowances are to be computed in the same manner. However, they are reduced by outside earnings, unemployment compensation, opportunities for available comparable work, and any period the employee would have been furloughed due to emergency conditions.

The BRS, SMWIA, and IAMAW agreements also compute wages on the basis of the prior 12 months, unless the employee has worked for less than 12 months.

The employee has the option of electing separation pay 30 days after furlough instead of the 7 days provided in *New York Dock*.

There are other modifications to the *New York Dock* conditions which we have reviewed and found to be fair and equitable to the employees and at least as protective as arrangements required by 49 U.S.C. 11347.

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[75] *New York Dock Railway* v. *United States*, 609 F. 2d 83 (2d Cir. 1979).

After analyzing these agreements, we are convinced that the interest of carrier employees covered thereby will be adequately and fairly protected by the terms of the agreements, and we find that the agreements do not render the proposed transaction inconsistent with the public interest. When we adopt a labor agreement, we impose it as a condition to our approval of the transaction.[76] We emphasize that these protective agreements shall apply only to those organizations which enter into such agreements with BN and Frisco prior to consummation of the merger.

This brings us to the next issue which we must consider when dealing with labor protection. RLEA contends that the employees of other railroads affected by the merger, as well as those of BN, Frisco, and their subsidiaries, must be provided with employee protection.[77] We disagree.

Labor protection conditions are designed to protect only employees of railroads participating in transactions. The *RLEA* case does not stand for the protection of employees of other railroads. In that case the railroad which was not a party to the transaction had been a participant in a joint facility agreement with the applicant. Its withdrawal from the facility was the genesis of the applicants' transaction.[78] Unlike that case there is no direct relation and sharing of facilities between BN, Frisco, and their subsidiaries and any other carrier whose employees may be affected by this transaction.

Additionally, we do not believe the statute warrants such an interpretation. Although the first sentence of section 11347 requires protection for employees who are *affected* by a transaction, the second sentence states that the arrangement may be made by *the rail carrier* and the authorized representative of its *employees*. Clearly this statute cannot be construed to require protection of all employees in the first sentence and be consistently construed to require the negotiations only between the carrier participating in the transaction and its employee representative. In statutory construction, significance and effect shall, if possible, be accorded to every word. No clause, sentence, or word shall be superfluous, void, or insignificant.[79] Reading the statute as a whole, we believe Congress intended protection only for employees of the merging railroads.

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[76] *Norfolk and Western R. Co. v. Nemitz*, 404 U.S. 37 (1971).

[77] See *Railway Labor Executives' Association v. United States*, 216 F. Supp. 101 (E.D. Va. 1963) (*RLEA* case) and *Soo Line Railroad Co. v. United States*, 280 F. Supp. 907 (D. Minn. 1978).

[78] *Brotherhood of Maintenance of Way Employee v. United States*, 366 U.S. 169, 173-174 (1961).

[79] See Finance Docket No. 27720, *Burlington Northern Inc.—Control Through Acquisition of Securities of—Green Bay and Western Railroad Company* (not printed), decided November 30, 1977.

The *Soo Line* decision relied upon by RLEA did not take into account the second sentence. Since this sentence suggests that only the employees of *the* rail carrier participating in the transaction can obtain an agreement, it is clear that the first sentence only refers to the employees of a railroad sufficiently involved (a subsidiary) or participating (a party to the contract) in the transaction so that they would be adversely affected by the transaction.

The plain words of the statute are confirmed by the legislative history. The basis of railroad employee protection is the Washington Job Protection Agreement of 1936 (WJPA). WJPA clearly defines the class of employees entitled to its protective benefits as the employees of carriers participating in a transaction, but not employees of competing carriers.[80]

The Committee of Six, appointed by President Roosevelt to study the problems of the railroad industry, urged codification of the WJPA.[81] This eventually became the basis for rail labor protection.[82] At the time of enactment of the Transportation Act of 1940 Congress did not consider protection of employees beyond those employed by the carriers that were parties to the transaction itself. This legislation was unchanged until the 4R Act, which expanded the scope of employee protection, but not the class of employees to be protected.

We have consistently interpreted employee protection to apply to only the employees of the railroads involved in the transaction.[83] This interpretation has not been changed by the 4R Act, and is entitled to the presumption that it is the correct interpretation.[84]

Sound policy reasons also support our statutory interpretation. It is difficult enough to determine which employees of a railroad involved in the transaction have been adversely affected by that transaction. To require a determination that employees of another

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[80] *In Re Public Nat'l Band*, 278 U.S. 101, 104 (1928).

[81] Section 4 of WJPA reads: "*Each carrier contemplating a coordination* shall give at least ninety (90) days written notice to bulletin boards convenient to *the interested employees of each such carrier* and by sending registered mail notice to the representative of such interested employees." [Emphasis added.]

[82] 49 U.S.C. 5(2)(f), now 49 U.S.C. 11347.

[83] *Baltimore & O. R. Co. Operations*, 261 I.C.C. 615 (1946); *Southern R. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962); *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261 (1962); *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963), affirmed *sub nom., Florida East Coast Railway Co. v. United States*, 259 F. Supp. 993 (M.D. Fla. 1966); *Texas & Pac. Ry. Co.—Control—Kansas, O.&G. Ry. Co.*, 324 I.C.C. 309 (1964); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304 (1966); and *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967).

[84] See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).

competing carrier have also been affected by a merger instead of some other economic factor would place an impossible burden on the party required to rebut the allegation.

We will not transfer the obligation of protecting employees from the railroad which employs them to another more efficient and competitive railroad. These employees should look to their contractual relations with their employer for protection.

Conditions

We have broad authority to impose conditions on railroad unifications. In the past we have imposed conditions to promote interstate transportation in the interest of the public and commerce of the people,[85] to enhance competition,[86] to improve the position of a carrier,[87] to open new gateways,[88] to establish new single-line service,[89] to preserve the integrity of an important switching carrier,[90] to preclude diversion of traffic,[91] to compensate partially a railroad for its anticipated traffic losses,[92] to protect railroads even though they will not suffer serious anticompetitive harm,[93] and to aid railroads not likely to be harmed by the transaction.[94]

This has been our policy in the past. However, the overriding factor governing the imposition of all conditions in the past has been the public interest. We would be remiss if we did not consider today's limits when imposing conditions on a railroad merger instead of viewing the industry as static.

Although at odds with past policy, applicants' arguments relating to imposition of conditions are quite appealing. The voluntary consolidation of more than one railroad, when properly conceived and executed, is expected to yield certain benefits to that railroad. Any condition imposed on that merger tends to decrease or eliminate the merger's expected benefits. However, there are certain conditions which might not adversely offset a merger's anticipated benefits because the operational efficiencies or competition resulting from the condition are of greater benefit to the public interest than harm to the merger.

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[85] *St Louis, SW Ry. Co.—Pur.—Alton & S.R.*, 331 I.C.C. 515 (1968).
[86] *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967).
[87] *Id.*, at 280-281.
[88] *Id.*, and *Seaboard Airline R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963).
[89] *Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965).
[90] See footnote 85.
[91] *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 654 (1967).
[92] *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556, 617 (1974).
[93] *Illinois Cent. Gulf R.—Acquisition—G., M. & O., et al.*, 338 I.C.C. 805, 842 (1971).
[94] *Louisville & N. R. Co.—Merger—Monon Railroad*, 338 I.C.C. 134 (1970).

As we have said, railroads do not have a proprietary right in the future to the traffic they have carried in the past. Therefore, we need not protect railroads from the possible loss of traffic through diversion to a merged railroad. On the contrary, protecting competing railroads tends to limit a shipper's ability to obtain the best service from the merged company and dampens the incentives for competitive response to the merged company from existing railroads. While a shift in traffic from one line to another may eliminate the need for service over the original line, this simply demonstrates that the earlier service is no longer essential. The consignor or consignee has the ability to determine, and in most instances does determine, which railroad will receive which traffic over specific routes.[93]

We have stated that we would not impose conditions solely to compensate carriers for diversion or protect them from the risks of competition. In connection with transactions such as this, it is not practicable, nor would it be in the public interest, to impose conditions calculated to freeze the flow of traffic into a preexisting pattern or to protect competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporation. Such action would prevent, to a substantial extent, the effectuation of service improvements to which the shipping public is entitled, and would unduly restrict the unified company in its solicitation and routing of traffic under development of a strong competitive system.[94]

We do not believe that a merger should be conditioned unless essential services have been shown to be affected and the condition: (1) is shown to be related to the impact of the merger (such as protection at an interchange where traffic is greatly affected); (2) is to enable shippers to receive adequate service; (3) will not provide a windfall to the carrier; (4) would not pose operating or other problems for the newly merged company; and (5) would not frustrate the ability of the merged company to carry out its objectives. Hence, a condition would not be imposed which drains the benefits of a proposed merger unless it benefits shippers, is operationally feasible, is related to the competition that will ensure from the merger, is sought by the protestant (whether or not agreed

[93] 49 U.S.C. 10707.

[94] See *Erie R. Co. Merger*, 312 I.C.C. 185, 191 (1960), affirmed 366 U.S. 1969 (1961); *Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279, 294 (1965); *Chicago & N. W. Ry. Co.—Merger*, 330 I.C.C. 13, 36 (1967); *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 187 (1963); and *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 485 (1950).

to by the applicant), and would not jeopardize the future of the merged company by depriving it of major benefits of the merger.

None of these criteria is new. We have stated before that conditions on a merger are not to be used to ameliorate longstanding problems which were not created by the merger.[97] We have also rejected opposed conditions that were in no way related either directly or indirectly to the involved merger.[98] Further, requiring a merged carrier to protect carriers against circumstances which were not caused by the merged carrier does not appear fair.[99]

Where a carrier can sustain and absorb losses from traffic diversion, protective conditions are not warranted.[100] As we have previously stated, we do not favor conditions which result in a windfall to railroads.[101]

We are concerned that conditions imposed on a merger be operationally feasible. We have refused to approve conditions where they are not found to be operationally feasible or cause congestion problems.[102]

Idemnity.—The Commission has imposed indemnity conditions when it was concerned about preserving existing service for the public and when it appeared that alternate protective conditions would not accomplish this result.[103]

Our imposition of indemnification in the past has been to allow a carrier to continue to provide service while a more permanent solution was being finalized. We no longer require that corporate entities be preserved; rather, we are concerned about essential services. In this climate a provision of indemnity seems highly anticompetitive. Indemnity may well induce a carrier to become less aggressive and provide less than optimum service. Indemnity also may be viewed as a reward for being unable to compete in the marketplace. This transfer of funds would, in effect, be a massive cross-subsidization not only of commodities, but of inefficient operations of another railroad, merely to preserve the existence of

[97] See *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 31 (1964).

[98] See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 540 (1966).

[99] See *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 643, 734 (1967).

[100] See *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556, 625 (1974) and *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 643, 734 (1967).

[101] See *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556, 612 and 625-626, (1974), *Illinois Cent. Gulf R.—Acquisition—G. M. & O., et al.*, 338 I.C.C. 805, 850 (1971), and *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 643, 751 (1967).

[102] See *Detroit, T. & I. R. Co.—Control*, 275 I.C.C. 455, 485 (1950).

[103] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 643, 738 (1967), 328 I.C.C. 304, 328 (1966), and 327 I.C.C. 475, 532 (1966) and *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556, 616 (1974).

the other railroad. Hence, we do not see indemnity as a viable condition under any circumstances.

Soo Line.—Soo Line has sought eight conditions in addition to standard traffic conditions. These involve opening gateways, trackage rights, termination of a pooling agreement, termination of a requirement to maintain a tunnel, an option to acquire certain grain gathering lines, and Commission retention of jurisdiction. In support of its proposed conditions, Soo Line has indicated that the merged company will divert approximately $1,250,000 from it. Applicants contend that Soo Line only stands to lose $250,000. Our analyses of Soo Line's traffic has led to the conclusion that it will lose as a maximum approximately $490,000 in gross revenue. From this amount, its net loss will be approximately $250,000. Soo Line has a strong financial posture. Even if its loss estimates do occur, they are not of such magnitude as to have a significant adverse effect upon Soo Line. In 1976 Soo Line's net revenue was $18,598,000. Its net revenue increased to over $27 million in 1978. Soo Line has not demonstrated that it will be harmed in any manner by this merger. Loss of traffic to a more efficient service does not require that we protect a strong and financially healthy carrier.

Because Soo Line will not suffer any significant harm from the proposed merger, we will not impose the protective conditions it seeks. Imposition of these protective conditions would amount to a long-term windfall to Soo Line of nearly $16 million. This is totally unjustified.

Further, the conditions which Soo Line seeks from BN are in areas where negotiation between the parties could yield the same result without burdening the merger. We much prefer the parties resolve their differences and any problems they have that do not relate to a merger in private negotiations.

Rock Island.—The Rock Island of 1976 no longer exists. It has not conducted its own operations since August 1979. The Bankruptcy Court has directed the trustee to file a plan for the liquidation of the railroad. Certain of its lines will be sold to other carriers and the remainder abandoned. The entity which estimated a gross revenue loss of approximately $8.5 million will no longer exist. However, the essential services provided by this entity should continue regardless of the conditions we impose in this merger.

Aside from the standard traffic protective conditions, Rock Island has requested five additional conditions. These involve a requirement that Henry Crown divest himself of Rock Island holdings, that Rock Island be indemnified for losses, that it be

granted trackage rights between Denver and Golden, CO, that it be granted permission to operate over or acquire a 50-percent interest in DRI&NW, and that certain divisions be reestablished.

Our analyses of the record has not shown that Henry Crown now controls the Rock Island nor will he have the ability to control the merged company. Although Mr. Crown has significant stock and debt holdings in the Rock Island, he has no more standing to control Rock Island than any other creditor. Divestiture of Mr. Crown's holdings would not save the Rock Island from its liquidation. More importantly, it is not related to the impacts of this merger.

We have already indicated that imposition of a condition providing for indemnity is not a proper condition. Additionally, we have grave reservations about the workability of an indemnity provision. We will not impose indemnity to benefit Rock Island.

As far as Rock Island's trackage rights between Denver and Golden, CO, are concerned, the condition of the Rock Island does not warrant the imposition of these conditions. The Rock Island itself will not benefit from being able to serve the industries along this line. Although shippers have indicated that they would benefit by Rock Island's service, Rock Island will no longer be able to provide services. If a railroad desires trackage rights over BN's subsidiary, it should negotiate an agreement with C&S. Additionally, we believe that there would be operational problems caused by Rock Island's operation over the line and that the proposed rent of $1 per year is unjust.

We have previously stated that we will not consider the issue of divisions in a merger proceeding.[104] It is necessary to follow the procedures we have set forth to deal with division disputes. We will not burden already complex and lengthy merger proceedings with evidence of requested divisions. For this reason, as well as Rock Island's imminent liquidation, we will deny this requested relief.

Katy.—Katy stands to lose a maximum of $8,750,000 in gross revenues. Our analyses indicate this would result in a loss of net revenue of approximately $4,500,000. As a result of this loss, Katy has requested indemnification. We have previously stated that we do not believe that indemnity is a proper solution for a railroad's problems.

Additionally, we do not believe that Katy's losses will adversely impact its ability to provide essential services. Katy's future appears to be bright. It has a number of coal-generating facilities which are located on its line. It potentially will serve eight coal facilities, each

[104] See *CSX Corporation—Control—Chessie System, Inc.*, 360 I.C.C. 610 (1979).

requiring 1 million tons of coal per year, and each generating 10,000 carloads or approximately $10 million in additional gross revenue per year. Currently three of these units are on line and Katy has indicated its gross revenue has increased by $26 million because of this. Additionally, Katy's massive rehabilitation program is nearly complete. Hence, the major expenditures Katy has made over the past few years for rehabilitation will be reduced to normalized maintenance costs. Katy also has a tax indemnification agreement with its parent company whereby Katy is reimbursed for every dollar of tax loss that Katy Industries uses from Katy.

Although Katy will suffer a major loss of interline traffic and revenue to BN and Frisco as a result of this merger, we believe that its future prospects are sufficient to protect it.

Rio Grande.—Rio Grande has requested certain routing and rate conditions. The only indication of the merger's effect on Rio Grande is applicants' estimate that Rio Grande will gain approximately $1.5 million as a result of the merger. Rio Grande does not believe it will gain any traffic from the merger, but will remain static. Regardless of which claim we accept, there is no evidence of record indicating Rio Grande will be harmed. Therefore, we see no reason to impose protective conditions.

Milwaukee Road.—Milwaukee Road seeks four conditions in this proceeding beyond the standard traffic conditions. These conditions are trackage rights to serve coal mines in eastern Montana, indemnification, liquidated damages for violating merger conditions, and permission to assign its rights in joint facility agreements with BN.

We have discussed Milwaukee Road's problems in our analyses of its traffic study. By the time this merger is consummated, the Milwaukee Road that existed in 1976 will no longer exist. Additionally, imposing conditions to benefit Milwaukee Road would transfer economic benefits from the merged company to a marginal carrier. It is not our policy to protect marginal carriers at the expense of railroads seeking consolidation through private industry initiative. We do not believe it is necessary here.

We have previously addressed our views on indemnification. Further, Milwaukee Road's deteriorated condition has not been caused by the prospective merger of BN and Frisco. The cause of its deterioration is an issue in the currently on-going proceeding in which it has requested inclusion in BN.[108] We will not address that issue here. Relief for Milwaukee Road will be provided in that case if it was caused by acts on BN and if it is necessary.

[108] Finance Docket No. 21478 (Sub-No. 4).

Milwaukee Road also proposes to use trackage rights over BN to provide service from coal mines in eastern Montana. Milwaukee Road has estimated that it may gain approximately $12 million in gross revenues from this operation. BN on the other hand has indicated that it may lose up to $50 million in revenues from this operation by Milwaukee Road. We do not believe that Milwaukee Road is currently capable of meeting the demands that would be placed upon it by service to the coal mines in Kuehn, Big Sky, and Colstrip, MT. This requested protection is also not related to impacts from the merger.

Although Milwaukee Road believes that liquidated damages of $100,000 for violation of any merger condition will force BN to abide by the conditions, we do not find such a penalty warranted. It is unfair to require such a "penalty," particularly when the violation may be so minor as to be but a small fraction of $100,000.

Milwaukee Road's desire to have a successor and assigns clause imposed in the joint facility agreements with BN is not within the purview of this merger. This is something that the parties can work out through negotiation. A give and take process, whereby Milwaukee Road would be willing to surrender something in order to obtain the benefit of being able to assign its rights in joint agreements, is the proper method to revise the agreements.

ICG.—In addition to standard traffic conditions, ICG seeks four other protective conditions. These are trackage rights between Memphis, TN, and Jasper, AL; terminal operations over Mopac between ICG and Frisco tracks in Memphis to facilitate the trackage rights; a gateway condition at Centralia, IL; and the right to serve facilities at the Birmingham terminal now served by Frisco. ICG seeks these conditions to offset what we have found to be approximately $6,780,000 in gross revenue diversion. This translates to $3,780,000 in net revenue loss.

We are sympathetic with ICG's request. However, we do not believe the conditions requested will benefit it.

We will not approve the trackage rights and concurrent terminal operation agreement for ICG to provide operations between Memphis and Jasper. First, we believe that there would be operational problems for ICG over that line. Although ICG points out it would only be adding two more trains while the merged company would add eight trains a day, the merged company should not be harmed by permitting another carrier operationally to impede the flow of its traffic. We also question whether ICG's trackage rights would be profitable and efficient. ICG has indicated

that it will reroute traffic over a tremendously circuitous route, if this condition is granted nearly doubling the mileage involved. We do not see how this can be beneficial to the public. Additionally, the revenue obtained from this routing by ICG may not be sufficient to cover ICG's cost.

We do not favor keeping an interchange open where it may result in inefficient service. For this reason we will not approve ICG's request to keep open its interchange arrangement with BN at Centralia, IL. If the traffic warrants, market forces will keep it open.

ICG's request to serve facilities at the Birmingham, AL terminal with its own engines and cars is something which should be negotiated with the merged company outside this proceeding. This type of condition should not burden a merger proceeding. It is a disagreement between the parties which existed prior to the merger and should not be presented for resolution in a merger proceeding. We reiterate that conditions sought in a merger should deal only with problems created by the merger.

Conditions imposed.—For the benefit of the carriers participating in this proceeding we shall impose standard traffic conditions as set out in appendix M for a period of 2 years. We believe this will give affected carriers sufficient time to adjust to the new competitive climate. Although we understand that the routing practices between the railroads are of longstanding, that does not require that it take a long time to change them. We are currently reevaluating our imposition of traffic protective conditions and will issue a policy statement on the matter shortly which may modify these conditions, but only after careful consideration. Specific conditions requested by KCS, Southern, SP and Cotton Belt, and UP for specific gateway and routing conditions will be imposed. The applicants have acquiesced to these conditions. We find that these conditions are operationally feasible, will not detract from the benefits of the merger, and are in the public interest.

We will not approve SP's requested trackage rights in the Portland, OR, area, providing SP with access to the North and South Rivergate industrial area. SP has not demonstrated any benefit from this trackage right. On the contrary, UP has demonstrated that it may cause operational problems in this area. Further, SP will merely acquire overhead trackage rights on BN. It will not be able to serve any shippers. Since we are required to find trackage rights in the public interest, we must deny SP's trackage rights even though stipulated to by BN.

CNW has also agreed to trackage rights with BN between St. Paul, MN, and Superior, WI, over the White Bear Lake route. These parties have negotiated what they believe to be reasonable compensation provisions. The parties also believe that there will be no operating problems and that CNW will be able tc operate over this route efficiently, saving it the expense of rehabilitation of its own routes between these two points. The Twin Ports area is a major originating and terminating point. This condition will not only benefit CNW but also the shipping public.

CNW has also negotiated an option with BN to lease 20 acres of land located in BN's Union Yard complex. Use of this land will permit CNW to perform more efficient service in the Minneapolis-St. Paul area. We find this condition is also in the public interest.

The conditions contained in appendix M shall be imposed on the merged company. They are all consistent with the public interest.

Control of FTC

When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operation, and will not unreasonably restrain competition.[106] This standard, as we have interpreted it, is not the basis for us to judge whether BN should be authorized to control FTC; instead the public interest test used to judge the overall transaction is the proper standard.

We have stated that where a transaction involving the control of a motor carrier by a railroad or of a motor carrier by a railroad affiliate, results in a change only of form, rather than in a change in substance, the proviso contained in 49 U.S.C. 11344(c) concerning the finding necessary in such cases is not applicable.[107] We have also approved the merger of a motor carrier controlled by a railroad into that railroad since the railroad would carry on the motor carrier operation as presently conducted.[108]

[106] 49 U.S.C. 11344(c).

[107] *New York Central R. Co. (Delaware) Merger*, 312 I.C.C. 417, 419 (1961). See also, *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M.C.C. 469, 472 (1938) and *Greyhound Mergers, 1936*, 1 M.C.C. 342, 351 (1936).

[108] *McCloud River R. Co.—Merger*, 1 M.C.C. 354, 356 (1936).

FTC's service is generally restricted to being auxiliary or supplement to Frisco's train service. After the merger FTC's service will still be auxiliary or supplemental to train service, although the name of the train service will change from Frisco to BN. FTC will provide the same service to, from, and between the same points. Its corporate parent will change from Frisco to BN, but FTC will still operate in conjunction with what had been Frisco before the merger. We believe that this transaction, as a result of the BN-Frisco merger, is merely a change in form, not substance.

The purpose of the BN-Frisco merger is to create a fiscally and physically healthy railroad capable of providing adequate service to the public. The control of FTC by BN is only a collateral impact of the merger, and will not result in any change of the physical properties of FTC, nor will it adversely affect the transportation service rendered to the public. The proposed transaction would create no new motor carrier network and there will be no adverse effect on competing motor carriers.

Securities

We may approve the issuance of securities by a carrier, and the assumption of an obligation or liability related to the securities of another person by a carrier[109] if we find the issuance or assumption: (1) is for a lawful object within the corporate purpose of the carrier and reasonably appropriate for that purpose; (2) is compatible with the public interest; (3) is appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier; and (4) will not impair the financial ability of the carrier to provide the service.[110]

The proposed issuance of stock by BN and the assumption by it of the obligation and liabilities of Frisco are governed by these principles. Each of these proposals is an integral part of the BN-Frisco merger plan, and must be approved in order to effectuate the merger. We have concluded that the BN-Frisco merger is consistent with the public interest. We have also concluded that the stock exchange ratio is fair, and that BN is financially capable of assuming Frisco's obligation and liabilities.

[109] 49 U.S.C. 11301(b)(1).
[110] 49 U.S.C. 11301(d)(1).

In past merger cases we have approved the issuance of securities and assumption of obligation and liabilities incidental to a merger.[11] The issuance of stock by BN and its assumption of Frisco's obligations and liabilities meet the statutory requirements, and shall be approved.

FINDINGS

In Finance Docket No. 28583 (Sub-No. 1F), subject to the terms and conditions set forth in appendix M, which we find to be just and reasonable, we find (a) that acquisition by Burlington Northern, Inc., of control of St. Louis-San Francisco Railway Company and its franchises and properties, and merger of St. Louis-San Francisco Railway Company and its properties and franchises into Burlington Northern, Inc., is within the scope of 49 U.S.C. 11343, is consistent with the public interest, and will not adversely affect the adequacy of transportation to the public; (b) that failure to include other railroads in the area involved in the transaction will not adversely affect the public interest; (c) that any guarantee, assumption of payments of dividends or of fixed charges, or any increase in fixed charges resulting from the transaction is consistent with the public interest; and (d) that the interests of employees affected by the proposed transaction will be adequately protected by imposition of the conditions set forth in appendix M.

In Finance Docket No. 28583 (Sub-No. 2F) we find (a) that Burlington Northern, Inc., is able, financially and otherwise, to consummate the transaction; (b) that the terms of the transaction are just and reasonable; (c) that the transaction is for a lawful object within the corporate purposes of Burlington Northern, Inc., and reasonably appropriate for that purpose, is compatible with the public interest, is appropriate for and consistent with the proper performance by Burlington Northern, Inc., of service to the public as a common carrier; and (d) will not impair the financial ability of Burlington Northern, Inc. to provide the service.

In No. MC-F-13500, we find that the acquisition by Burlington Northern, Inc. of control of Frisco Transportation Company through merger with St. Louis-San Francisco Railway Company is consistent with the public interest and will enable Burlington Northern, Inc. to

[11] *Seaboard Coast Line R. Co.—Merger—Piedmont*, 334 I.C.C. 378, 394-395 (1969); *Southern Pacific Transportation Co.—Merger*, 334 I.C.C. 866, 872 (1969); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967); and *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556 644 (1974).

use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

In Finance Docket No. 28583 (Sub-No. 3F), the Soo Line Railroad application for trackage rights over Burlington Northern, Inc. between McGregor, MN and Superior, WI is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 5F), Soo Line Railroad Company application for trackage rights over Burlington Northern, Inc., between Schley (Soo Junction), MN and Superior, WI, is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 6F), the Soo Line Railroad Company application for trackage rights over Burlington Northern, Inc., between Bald Eagle, MN and Superior, WI, is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 7F), the Illinois Central Gulf Railroad Company application for trackage rights over the St. Louis-San Francisco Railway Company between Memphis, TN and Jasper, AL is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 11F), the application of William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, debtor, for trackage rights over the Colorado and Southern Railroad Company between Denver and Golden, CO, is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 18F), the Southern Pacific Transportation Company application, as amended, for trackage rights over Burlington Northern, Inc. between BN milepost 8.154 near North Portland, OR and the connection between BN and Union Pacific Railroad Company trackage near Barnes Yard, is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 22F), the application of Richard B. Ogilvie, trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights over Burlington Northern, Inc., between Miles City, MT and Big Sky and Kuehn, MT is found not to be consistent with the public interest.

In Finance Docket No. 28583 (Sub-No. 23F), the Illinois Central Gulf Railroad Company application for terminal operations over the Missouri Pacific Railroad Company in Memphis, TN, is found not to be practicable or in the public interest.

We find that this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

CHAIRMAN GASKINS, concurring:

I agree with the majority opinion but I believe a few additional comments are required.

Section 11344 of the act requires the Commission to approve transactions which are consistent with the public interest and in making that determination we must consider among other factors "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction." The record in this proceeding is replete with studies regarding the effect on other carriers of this merger rather than "the effect on the public interest" which is the statutory test. This proceeding involves the merger of two end-to-end carriers who as a result of the transaction will be able to offer single-line service to shippers. Diversion of traffic to the single-line service may occur if the merged carrier offers faster transit times, lower rates or other features shippers desire. Shippers will determine how much diversion there will be. Opponents of this merger apparently would have us deny shippers the freedom to choose among various service and price options. I do not believe a merger which expands the service and price offerings available to the consumers of transportation services can be characterized as anticompetitive. It is for this same reason I oppose the imposition of the DT&I conditions which restricts the price/service alternatives a carrier can make available to shippers in order to protect competing carriers. We are charged with determining the public interest, not determining the parochial financial interests of individual railroads.

In any event, carriers not parties to the merger have the option of coordinating their services, through mergers of their own or contractual arrangements, to offer comparable service and price features. By so doing, these carriers may be able to prevent diversion or it is possible the new arrangements they work out may result in the merged carrier actually losing business. For example, if the merged carriers diverts what was formerly interline traffic to its lines, competing carriers, of which there are many in this case, may retaliate by diverting traffic they originate away from the merged carrier. How these traffic changes will net out is probably impossible to calculate. The statistics compiled in this case do not and cannot reflect the dynamics of the marketplace. The diversion estimates contained in appendix H assume a static market when we know that competing carriers will adjust their business practices as quickly as possible to maximize their revenue in the changed marketplace.

COMMISSIONER STAFFORD, dissenting in part:

While I agree with the majority that the merger should be approved, I disagree with the majority's conclusions regarding the imposition of several requested conditions.

In the first place, I disagree with the majority's conclusion that indemnity is not an appropriate condition under any circumstance. Furthermore, I think this conclusion is inconsistent with what the majority sets out as its primary concern in the discussion dealing with indemnity, i.e., the retention of essential services. The logical conclusion to be drawn from this concern is that when essential services are threatened as a result of a merger, indemnity is an appropriate condition. Based on the record before us in this case, I conclude that the MKT has demonstrated that the losses it will incur as a result of the merger will adversely affect its ability to provide essential services.

The MKT serves Kansas, Missouri, Oklahoma, and Texas, and is the only rail service available to a significant number of the 1,500 industries that it serves. The MKT provides, for example, the only rail service for two large coal-fired powerplants located in Texas and Oklahoma. In addition, MKT's main line between Kansas City and north Texas points has been identified by the Federal Railroad Administration as a primary line in a principal corridor in the Southwest. Thus, it appears to me that the Katy provides essential rail service.

Turning to the impact of the merger on the Katy, the Commission has found that the railroad will lose approximately $8.9 million in gross revenues as a result of the transaction. This loss in gross revenue will result in a loss of net revenue of approximately $4.5 million. Based on the Katy's overall financial condition, it appears to me that the railroad is not in a position to absorb such a loss. Although it showed a net profit of $2.4 million in 1978, this was made possible only by a $6.1 million income tax credit under a tax allocation agreement with its parent company. Without this credit, the MKT would have shown a $3.7 million deficit in 1978. In fact, the Commission itself has recently found that the Katy has inadequate revenue, experiences continuing net losses, and is in a very weak financial condition. *Adequacy of Railroad Revenue*, 362 I.C.C. 198, 324 (1978).

Based on these findings, I believe the MKT has shown that an indemnification condition is justified in this case. However, rather than applying the indemnification formula proposed by MKT, I

would employ a revised formula which would more closely represent any actual loss incurred by MKT as a direct result of the merger, for 5 years following consummation.

In addition to the indemnification issue, there are two other areas in which I disagree with the majority. One involves the 2-year time limit placed on the standard traffic conditions. I agree with Commissioner Clapp that we should not impose a time limit on the conditions since we will be examining their appropriateness in another proceeding. The second area of disagreement involves the gateway condition sought by ICG at Centralia, IL. Again, I agree with Commissioner Clapp that it is difficult to reconcile our finding that the imposition of this condition for the ICG is not in the public interest with our finding that a similar condition sought by Southern Railway is in the public interest. Therefore, I believe that this condition sought by ICG should be imposed.

COMMISSIONER CLAPP, concurring in part and dissenting in part:

I disagree with the 2-year limitation on the imposition of the DT&I traffic conditions and with the nonimposition of the Centralia gateway condition sought by ICG.

I would impose the customary DT&I conditions without a time limit. We will shortly be instituting a proceeding, through which we will solicit comments and examine the relative advantages and disadvantages to the public interest in imposing traffic conditions in merger cases. Should we find in that proceeding that the standard traffic conditions are per se not in the public interest, we could then remove conditions imposed in this merger proceeding, whether that determination is made 3 months, 6 months or 2 years from now. Should we find the conditions generally in the public interest, then the conditions should remain in effect beyond 2 years. Should we determine that the applicability of the conditions depends on the facts in a particular merger case or that modifications to the conditions customarily imposed in the past are in order, we can certainly make adjustments.

In any event, I believe that if traffic protective conditions are ever in order, they are in order in a merger case of the magnitude of the BN-Frisco union. I would add that imposing the conditions for a 2-year period makes little sense, especially since applicants say they expect to reap the primary benefits of the merger only after the first 2 years.

I would continue to impose the standard DT&I conditions in merger proceedings without a specific time limitation at least until

we have an opportunity to weigh, on a fully developed record, the effects of the conditions on the public interest. I would at the same time retain jurisdiction to modify or eliminate the conditions should the outcome of our subsequent deliberations warrant that result.

Secondly, I would impose a condition to protect ICG's interchange arrangements at Centralia, IL. In this decision, we find a similar arrangement for the protection of Southern Railway to be in the public interest because of a stipulated agreement between Southern and the applicants. While I agree that stipulations should be honored where possible and that the Centralia condition sought by Southern should be approved for imposition as the parties have agreed, I find it difficult to conclude that a condition protecting Southern—a strong carrier—is in the public interest while finding that a similar condition designed to protect ICG—a much weaker carrier—is not in the public interest.

It is ordered:

1. In Finance Docket No. 28583 (Sub-No. 1F), acquisition of control by Burlington Northern, Inc. of St. Louis-San Francisco Railway Company and its franchises and properties, and merger of St. Louis-San Francisco Railway Company and its franchises and properties into Burlington Northern, Inc., on the terms and conditions stated in the application and in this decision, is approved and authorized.

2. In Finance Docket No. 28583 (Sub-No. 2F) Burlington Northern, Inc. is authorized: (a) to issue not exceeding 2,560,791 shares of common capital stock without par value; (b) to issue not exceeding 1,347,785 shares of $2.125 no par value preferred stock, $25 redemption value; and (c) to assume all obligations and guarantees with respect to securities issued, assumed, or guaranteed by St. Louis-San Francisco Railway Company and subsidiary or affiliated companies, upon the terms and conditions agreed to between the parties and for the purpose stated here.

Burlington Northern, Inc. shall report concerning the matters involved in accordance with 49 CFR 1115.6.

Except as authorized here, the stock shall not be sold, pledged, repledged, or otherwise disposed of or assumed by Burlington Northern, Inc., until or unless so ordered or approved by this Commission.

Pursuant to 49 U.S.C. 11301(d)(1) the Commission reserves the right to make any supplemental decision herein as it may deem necessary.

Nothing herein shall be construed to imply any guarantee or obligation as to said securities or dividends or notes or interest thereon on the part of the United States.

3. In No. MC-F-13500, acquisition of control by Burlington Northern, Inc., of Frisco Transportation Company through the merger with St. Louis-San Francisco Railway Company is approved and authorized subject to conditions.

4. If the authority granted in this decision is exercised, Burlington Northern, Inc., shall within 60 days of consummation submit three copies of a sworn statement showing all journal entries required to effect the transaction.

5. If the parties consummate the transaction in No. MC-F-13500, they shall promptly take such steps to comply with 49 U.S.C. 10927, 10762, and 10330, and with the rules, regulations, and requirements prescribed under the statute.

6. If the parties consummate the transactions they shall confirm in writing to this Commission, immediately after consummation, the dates on which consummations have actually taken place.

7. If the authority granted in this decision is not exercised within 1 year of the effective date of this decision, or such further time as may be fixed by the Commission, then this decision shall be of no further force and effect.

8. Employees of Burlington Northern, Inc., and St. Louis-San Francisco Railway Company affected by this transaction shall be afforded the relief set forth in appendix M of this decision.

9. In Finance Docket No. 28583 (Sub-Nos. 3F, 5F, and 6F), the applications of Soo Line Railroad Company for trackage rights are denied.

10. In Finance Docket No. 28583 (Sub-No. 4F), the Soo Line Railroad Company application for trackage rights is dismissed.

11. In Finance Docket No. 28583 (Sub-No. 7F), the Illinois Central Gulf Railroad Company application for trackage rights is denied.

12. In Finance Docket No. 28583 (Sub-Nos. 8F and 9F), the Chicago and North Western Transportation Company applications for trackage rights are dismissed.

13. In Finance Docket No. 28583 (Sub-No. 11F), the application of William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company, debtor, for trackage rights is denied.

14. In Finance Docket No. 28583 (Sub-No. 18F), the Southern Pacific Transportation Company application for trackage rights is denied.

15. In Finance Docket No. 28583 (Sub-No. 19F), the Atchison, Topeka and Santa Fe Railway Company application for trackage rights is dismissed.

16. In Finance Docket No. 28583 (Sub-No. 22F), the application of Richard B. Ogilvie, trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, debtor, for trackage rights is denied.

17. In Finance Docket No. 28583 (Sub-No. 23F), the Illinois Central Gulf Railroad Company application for terminal operations is denied.

18. The record is reopened to receive: the labor agreements filed between certain labor organizations and Burlington Northern, Inc., and St. Louis-San Francisco Railway Company; the stipulations between Chicago and North Western Transportation Company and Burlington Northern, Inc., and St. Louis-San Francisco Railway Company; and evidence of the value of New Mexico and Arizona Land Company.

19. This decision shall be effective 30 days from the date of service.

20. The requirement of an initial decision is waived pursuant to 49 U.S.C. 11345(e). The decisions embraced here are final decisions within the meaning of 49 U.S.C. 10327. Any administrative appeal may be entertained only under 49 U.S.C. 10327(g) which permits appeal only if the entire Commission finds it warranted in its own discretion because of material error, new evidence, or substantially changed circumstances.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis. Chairman Gaskins concurring with a separate expression. Commissioner Stafford dissenting in part with a separate expression. Commissioner Clapp concurring in part and dissenting in part with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

360 I.C.C.

APPENDIX A

Abbreviations used in this decision

Rail Carriers:

ACY - The Akron, Canton & Youngstown Railroad Company
ALM - Arkansas & Louisiana Missouri Railway Company
ATSF - The Atchison, Topeka and Santa Fe Railway Company (Santa Fe)
BCE - British Columbia Hydro and Power Authority
BM - Boston & Maine Corporation
BN - Burlington Northern, Inc. (Burlington)
BO - The Baltimore and Ohio Railroad Company
BS - Birmingham Southern Railroad Company
CCO - Carolina Clinchfield & Ohio Railway
CEI - Chicago and Eastern Illinois Railroad Company
CHV - Chattahoochee Valley Railway Company
CN - Canadian National Railway Company
CNL - Columbia Newberry & Laurens Railroad
CNW - Chicago and North Western Transportation Company
CO - The Chesapeake and Ohio Railway Company
CP - Canadian Pacific Limited
CR - Consolidated Rail Corporation (ConRail)
CRIP - Chicago, Rock Island and Pacific Railroad Company (Rock Island or RI)
C&S - The Colorado and Southern Railway Company
CSS - Chicago, South Shore and South Bend Railroad
DH - Delaware and Hudson Railway Company
DM - Detroit and MacKinac Railway Company
DQE - DeQueen and Eastern Railroad Company
D&RGW - Denver and Rio Grande Western Railroad Company (Rio Grande)
DRI&NW - Davenport, Rock Island and North Western Railway Company
DS - Durham and Southern Railway Company
DT&I - Detroit, Toledo and Ironton Railroad Company
DTSL - Detroit and Toledo Shore Line Railroad Company
DVS - Delta Valley & Southern Railway Company
DW&P - Duluth, Winnipeg & Pacific Railway
EJ&E - Elgin, Joliet and Eastern Railway Company
FEC - Florida East Coast Railway Company
FW&D - Fort Worth and Denver Railway Company
GA - Georgia Railroad
GB&W - Green Bay and Western Railroad Company
GNA - Graysonia, Nashville & Ashdown Railroad Company
GTW - Grand Trunk Western Railroad Company
HPTD - High Point, Thomasville & Denton Railroad
ICG - Illinois Central Gulf Railroad
IHB - Indiana Harbor Belt Railroad
ITC - Illinois Terminal Railroad Company
KCS - Kansas City Southern Railway Company
KCT - Kansas City Terminal Railway Company
L&A - Louisiana & Arkansas Railway Company
L&N - Louisville and Nashville Railroad Company

LNW - The Louisiana & Northwest Railroad Company
MBRR - Meridian & Bigbee Railroad Company
MCR - McCloud River Railroad
MDW - Minnesota, Dakota & Western Railway Company
MEC - Maine Central Railroad Company
MILW - Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road)
MKT - Missouri-Kansas-Texas Railroad Company (Katy)
MN&S - Minneapolis, Northfield and Southern Railway
MP - Missouri Pacific Railroad Company (Mopac)
MTW - Marinette, Tomahawk & Western Railroad Company
N&W - Norfolk and Western Railway Company
NWP - Northwestern Pacific Railroad Company
OE - Oregon Electric Railway
OT - Oregon Trunk Railway
PCR - Pacific Coast Railroad Company
PLE - Pittsburgh & Lake Erie Railroad
PW - Providence and Worcester Company
QAP - Quanah, Acme & Pacific Railway Company
RFP - Richmond, Fredericksburg and Potomac Railroad Company
RSP - Roscoe, Snyder & Pacific Railway Company
SAN - Sandersville Railroad Company
SCL - Seaboard Coast Line Railroad
SN - Sacramento Northern Railway
SI - Spokane International Railroad
SLSF - St. Louis-San Francisco Railway Company (Frisco)
SOO - Soo Line Railroad Company (Soo Line)
SOU - Southern Railway Company (Southern)
SP - Southern Pacific Transportation Company
SP&S - Spokane, Portland and Seattle Railway Company
SS - Sand Springs Railway Company
SSLV - Southern San Louis Valley Railroad Company
SSW - St. Louis Southwestern Railway Company (Cotton Belt)
TM - The Texas Mexican Railway Company
TOE - Texas, Oklahoma & Eastern Railroad Company
TP&W - Toledo, Peoria & Western Railroad Company
TRRA - Terminal Railroad Association of St. Louis
UP - Union Pacific Railroad
VTR - The Vermont Railway Incorporated
WA - The Western Railway of Alabama
WM - Western Maryland Railway
WP - The Western Pacific Railroad Company
WSS - Winston-Salem Southbound Railway
WWV - Walla Walla Valley Railroad Company

Other abbreviations used:
AAR - Association of American Railroads
BN Air - Burlington Northern Air Freight
CB&Q - The former Chicago, Burlington and Quincy Railroad
DOD - U.S. Department of Defense

DOJ - U.S. Department of Justice
DOT - U.S. Department of Transportation
Family Lines - SCL, L&N and their subsidiaries
FASB - Financial Accounting Standards Board statements
FRA - Federal Railroad Administration (DOT)
FTC - Frisco Transportation Company
GN - The former Great Northern Railway
GNP&B - The former Great Northern Pacific & Burlington Lines, Inc.
GRDA - Grand River Dam Authority
GTM - gross tons per mile
IA-DOT - Iowa Department of Transportation, Transportation Regulation Board
ICC-E&E - Interstate Commerce Commission, Section of Energy and Environment
IL-DOT - Illinois Department of Transportation
KC Board - Kansas City Board of Trade
LCRA - Lower Colorado River Authority
MT-Wheat - Montana Wheat Research and Marketing Committee
ND-Wheat - North Dakota State Wheat Commission
ND-PSC - North Dakota Public Service Commission
NE-PSC - Nebraska Public Service Commission
New Mex - New Mexico and Arizona Land Company
NROI - Net Railway Operating Income
NP - The former Northern Pacific Railway
RED - Railway Employees' Department, AFL-CIO
ROI - Railway Operating Income
RLEA - Railway Labor Executives' Association
SCNO Barge - Sioux City and New Orleans Barge Line
Sunbelt - The Southwest, South Central States, and Southeast, collectively
TOFC - Trailer on flatcar
USRA - United States Railway Association
UTU-BN - M.M. Winter, General Chairman of the United Transportation Union on Burlington Northern
UTU-ICG - M.S. Stuckey, General Chairman of the United Transportation Union on Illinois Central Gulf Railroad
UTU-IL - John W. McGinness, Illinois Legislative Director of the United Transportation Union
WI-P&L - Wisconsin Power and Light Company

APPENDIX B

Status of related proceedings

Parties in this proceeding filed 21 applications seeking relief from BN and Frisco. Of these, we rejected three, previously dismissed six, herein dismiss four (although one will be refiled pursuant to our conditions), and the remaining eight are being denied.

We rejected Milwaukee Road's request for trackage rights over BN between Miles City, MT and all present and future coal mines located on BN in Montana. We also rejected applications by two shippers, MT-Wheat and Wyo-Ben, because both were

incomplete. Additionally, we determined that shippers do not have standing to seek trackage rights for one carrier over another carrier.

Six applications were dismissed upon requests from the carriers themselves. Two Rock Island applications were dismissed. They were for trackage rights over BN between Lincoln and Havelock, NE, and between Ottawa and Streator, IL. The other four applications which were dismissed had been filed by Milwaukee Road. They were for trackage rights over BN between Terry, MT, and Spokane, WA; Tacoma and Chehalis, WA; Council Bluffs, IA, and Kansas City, MO; and Bellingham and Cherry Point, WA.

Four applications for trackage rights have been dismissed in this decision. Soo Line withdrew its request for trackage rights over BN between Paynesville, MN, and Superior, WI. CNW reached a stipulation and withdrew the requested relief which was not a part of the stipulation. It withdrew applications for trackage rights between Council Bluffs, IA, and BN Junction, MO and between East Minneapolis, MN, and East Superior, WI. BN and CNW have reached an agreement whereby CNW would obtain trackage rights over BN between East Minneapolis and Superior, WI, on the White Bear Lake route.

Santa Fe's request for trackage rights over Frisco between Tulsa and Oklahoma City, OK, is dismissed since Santa Fe also entered a stipulation with BN withdrawing this request.

Eight other proceedings were still being prosecuted at the time of this decision. All have been denied for various reasons as not consistent with the public interest.

Three Soo Lines applications have been denied. They were for trackage rights over BN between McGregor, MN and Superior, WI; Schley (Soo Junction), MN and Superior, WI; and Bald Eagle, MN, and Superior, WI.

ICG sought trackage rights over Frisco between Memphis, TN and Jasper, AL. Complementing this application, ICG sought terminal operations over Mopac in Memphis, to connect its track with the Frisco line. Both of these applications have been denied.

Rock Island sought trackage rights over BN's subsidiary C&S between Denver and Golden, CO. This application also has been denied.

SP sought trackage rights over BN in the North Rivergate area of Portland, OR. BN agreed to grant SP these trackage rights in a stipulation. However, we found that these trackage rights will not be consistent with the public interest in this proceeding. This is not to say that BN and SP cannot negotiate these trackage rights outside the scope of this proceeding. We just do not believe that this extra baggage, offering no operational or economic benefits, should accompany approval of a merger.

The final application which is still pending, at the time this decision was rendered was Milwaukee Road's proposal to obtain trackage rights over BN between Miles City and Big Sky and Kuehn, MT, to provide service to the coalfields in eastern Montana. This application was also denied.

APPENDIX C

Shippers' positions

SHIPPERS IN SUPPORT OF MERGER

Kerr-McGee Corporation, located in Oklahoma City, OK, is a broadly based natural resources company with principal operations in oil and gas, uranium, coal, minerals, basic chemicals, plant food, forest products and contract drilling.

In 1977, Kerr-McGee paid approximately $150 million in transportation costs, of which approximately 95 percent was for rail transportation. In routing traffic by rail, Kerr-McGee considers service quality (transit time and car supply among other things), instead of just single-line service. In routing traffic, the origin carriers are usually favored with long hauls. In most instances, Kerr-McGee routes the traffic. However, where coal is shipped free on board at a mine, its customers provide the transportation and cars and route the traffic. Kerr-McGee owns some of its cars.

Kerr-McGee is currently served by Frisco at Hamilton and Columbus, MS, and Springfield, MO. BN provides Kerr-McGee service at its Jacobs Ranch Coal Mine near Gillette, WY.

Kerr-McGee supports the merger because it will provide efficient and economical single-line service for Kerr-McGee's plants and customers. Kerr-McGee points out that single-line service offers faster transportation time, enabling its customers to make faster and better use of cars. It is critical to Kerr-McGee that turnaround time on cars be improved to help alleviate the car shortage.

Kerr-McGee also expects the merger to open new markets to it by providing greater single-line service; provide run-through train service with reduced switching and interchange time, providing for greater utilization of rail freight cars; and enable tracing and expediting of shipments by reducing the number of railroad cars required.

Kerr-McGee does not oppose opening gateways so long as levels of service are maintained. It believes that open gateways will benefit its customers.

International Minerals and Chemical Corporation (IMC) located at Mudelein, IL, has annual sales of approximately $1.28 billion. It produces, markets, and transports approximately 20 million tons annually of three basic fertilizer materials, as well as mixed fertilizer, animal feed ingredients, cholor-alkalis, hydrocarbon products, nitroparaffins, methonal, feldspathic materials, and other chemical products, petroleum coke, industrial and foundary sand and additives, clays, stone, and coal. Its annual outbound freight expenses are approximately $367 million, of which approximately $300 million is for rail.

IMC owns 42,000 cars. It rewards good service with additional business and uses rail because it is a landlocked shipper.

In routing traffic, IMC favors the origin carrier with the long haul, along with the supplier of equipment and the terminating carrier. IMC considers transit time the most important factor, instead of the number of carriers in a route. Loss and damage potential, along with reasonable rates, are also criteria in routing traffic. IMC designates the routing on all movements, including the bridge carrier. However, IMC does not indicate junctions. It will reroute traffic from a multiline route if one of the carriers involved is weak.

In 1977, BN handled 1,298,344 tons at eight IMC facilities and Frisco handled 200,720,770 tons at two IMC facilities. IMC also uses numerous other rail carriers.

A major benefit that IMC sees from the merger is a single-line, expedited service with expedited turnaround time on IMC cars, along with innovative rates and an increased car supply. IMC also sees the possibility of expanding its markets for fertilizer beyond the Corn Belt into the southeast, using the single-line service of the merged company. It believes that car shortages at its clay plant can be alleviated through the use of BN's car fleet. However, IMC will only tender more traffic to BN if the service is better after the merger.

IMC would like to see current gateways maintained to extend competition. It does not oppose conditions to maintain current levels of interchanged service or opening routes and gateways. IMC points out that other railroads can institute new

transportation techniques with costs savings to be competitive with the merged company. Because of Milwaukee Road's deteriorated conditions it routes around the Milwaukee Road.

Proctor and Gamble Company is headquartered at Cincinnati, OH. It manufactures and distributes a broad range of industrial and consumer products from approximately 40 plants in the United States. Its transportation costs approximate $1 million a day, and it uses rail 35 percent of the time (approximately $127 million in rail freight expenses a year). On inbound routing, Proctor and Gamble uses rail in lieu of motor based on the terms of the purchase of materials, quantity of material needed, and freight costs. Outbound shipments are routed by Proctor and Gamble's sales department. In routing traffic, Proctor and Gamble designates the carriers in the routing but not the junctions, and routes the traffic 100 percent of the time. Proctor and Gamble does not own equipment.

It has five existing or proposed facilities served by BN and Frisco. Proctor and Gamble's other facilities throughout the Nation are served by numerous rail carriers.

Proctor and Gamble believes that the merger will give it access to a much larger car fleet and a considerably expanded area of direct service. It intends to use the new single-line service only if it is superior to current service. It believes that the direct service which BN would be able to provide would result in faster transit time.

Proctor and Gamble points out that the merger will not change its practice of tendering traffic to other carriers. Additionally, it does not oppose imposition of conditions on the merger.

Proctor and Gamble believes that the availability of both cars and service is critical if the railroads are to grow with the economy and prosper financially. It believes that the merger will encourage such results.

Farmland Industry, Inc. is a manufacturing and marketing cooperative headquartered in Kansas City, MO. It is owned and controlled by over 2,200 local cooperatives throughout 17 Midwestern States. It ships from eight points bounded by the Mississippi River in the east, the Continental Divide in the west, Canada in the north, and the Gulf of Mexico in the south. The commodities which Farmland ships are generally agricultural. Total freight costs approximate $200 to $250 million annually.

Farmland routes all of its outbound traffic and 75 percent of its inbound traffic. It favors the origin carrier that provides equipment and performs switching. The next preference in routing goes to destination carriers who provide switching. Farmland's routing policy is based on the best possible service.

Farmland's facilities are served by many different railroads employing covered hopper cars, tank cars, boxcars, and refrigerated cars. It owns or leases over 2,800 tank and covered hopper cars. BN and Frisco each handle approximately 5,000 cars per year for Farmland.

Farmland supports this merger because it is end-to-end. Farmland believes that the merger will result in: better service on a single-line basis; the elimination of costly and time-consuming traffic interchanges; more initiative in routing, pricing, and technological innovations, resulting in better service and more efficient utilization of equipment and power; more consistent quality of service and better service routes over a longer haul with less delays. Farmland foresees a lesser burden on the merged company due to lack of excess personnel, rail capacity, or train schedules.

Farmland believes that other railroads will be able to compete with the merged company if they provide service. It believes that the Commission must protect other railroads and maintain existing routes. Farmland expects quality on joint routes to

improve with the new single-line routes. It takes no position on any other proposed condition.

American Cast Iron Pipe Company (ACIP) is located in Birmingham, AL, and manufactures and distributes cast iron and steel pipe. It ships approximately 500,000 tons of finished products from its Birmingham facility annually and receives an equal amount of material. Approximately $10 million is spent on outbound transportation from Birmingham of which 55 percent is for rail transportation. Its products move in bulkhead flatcars and gondola cars.

ACIP routes outbound traffic via the separate carriers, but does not designate a junction. It also routes inbound traffic. ACIP allocates traffic based on car supply, general service, and attention to its needs. However, car supply is almost always the controlling factor in routing because of car shortages. ACIP does not own any rail equipment.

Frisco serves ACIP at North Birmingham, AL, transporting approximately 20,000 cars a year for ACIP. ACIP is also served by L&N and ICG. Both provide single-line service between Birmingham and Chicago. ACIP also favors existing run-through train service.

ACIP favors the merger because it will create a single, larger, financially strong carrier. It also believes that the end-to-end merger will benefit ACIP by: allowing it to draw on the merged company's car supply; permitting single-line service of important raw material from Chicago to Birmingham and finished products from Birmingham to Minneapolis; enhancing its ability to expedite and trace shipments; and facilitating the movement of traffic over existing interchange points of open-top loads.

Amax Coal Company is the third largest United States coal producer. It has mines in Illinois, Indiana, Kentucky, and Wyoming. Annual production in 1977 was nearly 14 million tons of coal. Production is expected to increase to 25 million tons in 1980, 37 million tons in 1987, and continue at that level beyond the year 2000. Ninety-nine percent of this coal is distributed to electric utilities. Amax's coal reserves total approximately 3.5 billion tons.

Generally, traffic from Amax mines is shipped free on board at the mine entrance and is routed by the buyer in unit coal trains. BN currently serves Amax's Sunspot Mine in Illinois and its Belair and Eagle Butte Mine in Wyoming. Amax believes that competition for coal traffic is important to keep rates down.

Amax supports the end-to-end merger because: it will enhance Amax's market for its coal by bringing the Birmingham steel industry, export facilities, markets in Missouri and Oklahoma, and connections to the river transportation system into single-line service; it will provide alternate routings for movement of coal from Wyoming; interrailroad problems will be eliminated and more efficient operations could result; and the financial status of the merged company will improve, further insuring shippers of BN's capability to fulfill its goals in the Powder River Basin.

Boise Cascade Corporation, of Boise, ID, is an integrated cross-product company involved in manufacturing wood products, paper products, cans, corregated containers, envelopes, and manufactured housing, in addition distributing office products and building materials. In 1977 Boise Cascade had gross sales of $2.3 billion and rail transportation costs of $157 million. It has over 200 shipping facilities throughout the United States. In the West, Boise Cascade ships over UP, BN, SP, Santa Fe, and Milwaukee Road, in order of magnitude. In the Midwest, Boise Cascade uses KCS, Soo Line, and CNW. It estimates that each serving railroad receives approximately $1,200 per carload in revenue. Boise Cascade's traffic routing policy favors the origin and destination carriers with the longest haul possible consistent

with service requirements. Boise Cascade controls all outbound routing to control the service, cost, equipment availability, and insurance. Boise Cascade generally ships over the better service route (the fastest route).

In choosing new intermediate carriers, Boise Cascade considers service, equipment, and other factors. It estimates that for outbound shipments it pays BN approximately $20 million a year, based on 17,196 carloads. Frisco revenues from Boise Cascade are approximately $2 to $2.5 million a year, based on 1,864 carloads.

Boise Cascade supports the merger because it: is an end-to-end merger; will contribute to effective competition; will not curtail rail service by abandonment; will provide adequate protection to existing employees; will not significantly or adversely affect other rail carriers; will provide operating efficiency; and will financially strengthen BN to the benefit of the general shipping public. Boise Cascade also sees single-line service as an improvement over joint-line service. It views the merger as a positive step in improving the vitality and viability of the Nation's deteriorating railroad system.

After merger Boise Cascade does not intend to change its routing policy. It believes that any railroads which are affected by the merger should make themselves more competitive. It believes that the number of carriers involved in routing is not always significant, but that the service provided is the measure of significance. It is not opposed to any conditions which would maintain a high standard of service.

Lamb-Weston is a division of Amfac Foods, Inc., headquartered in Corklin, OR. It is a major frozen food processor with five plants and four warehouses located in the Northwest. In 1977 Lamb-Weston originated over 9,000 carloads of shipments and paid $15 million in freight for these shipments.

Mechanical refrigerator car supply is vital to Lamb-Weston. It relies on railroads to supply cars and use expeditious routes to improve car use. Lamb-Weston routes all the traffic and pays the freight charges. It generally provides the originating carrier that supplies cars with a long haul.

In 1977 BN earned approximately $5 to $7 million in revenues from Lamb-Weston. There is no record of Frisco earnings.

In support of the merger, Lamb-Weston asserts that the benefits would include: efficient and productive utilization of the combined mechanical refrigerator car fleets of BN and Frisco; better rail service and transit times between the Northwest and Southwest; and fair and equitable capital investment by the merged company to meet the equipment needs of Lamb-Weston.

Lamb-Weston does request that the Frisco-UP run-through train service in Kansas be maintained. It also favors opening the Wallula gateway with UP.

Weyerhaeuser Company is a lumber, wood and derivative products company headquartered in Tacoma, WA. It has substantial timber holdings in North Carolina, Oklahoma, Mississippi, and Arkansas. Its largest holdings of 2.8 million acres are in Washington and Oregon. It also has mills in these States.

Weyerhaeuser's rail service costs approximately $255 million annually. Weyerhaeuser routes all outbound traffic based on service (transit time and car supply). The origin or destination carrier usually is given a long haul. BN is an origin carrier at eight Weyerhaeuser locations, while Frisco serves three. Weyerhaeuser points out that both BN and Frisco are key participants in its inbound and outbound routes. In 1977, BN revenue from Weyerhaeuser was approximately $19.5 million.

Weyerhaeuser supports the merger because it is directed toward strengthening the rail system and coordinating use of facilities. Weyerhaeuser believes the merger will provide opportunities for transit time reductions, improved car utilization, and

innovations in service and ratemaking (multicar, trainload and incentives for heavy loading rates). Weyerhaeuser states that it will use BN's new single-line service. It requests that the Commission keep current gateways open upon consummation of the merger.

Shell Oil Co. of Houston, TX, is engaged in the exploration, production, manufacturing, and marketing of various petroleum and chemical products. It has plants throughout the United States. Annually Shell ships over 40,000 carloads, with most of these shipments in its own 5,000 tank and covered hopper cars.

Most of Shell's shipments are free on board at destination. Shell routes these shipments and generally gives the origin or destination carrier a long haul as long as safe service is provided along with reasonable transit time. When the goods are delivered free on board at origin, the customer routes the shipment. Shell paid approximately $100 million for rail transportation in 1977. Of this BN and Frisco accounted for approximately 3 percent.

Shell believes that the merger can produce a financially viable railroad which will provide the safe and efficient transportation that chemical products require. Shell believes that specific benefits of the merger include: single-line service resulting in shorter transit times and improved general safety; a single source of carrier responsibility for tracing and expediting cars and simplifying billing and collections; improved financial health of the merged railroad; combined fleets and maintenance and repair facilities, resulting in operating efficiencies and economies; a larger car fleet and better car utilization, along with increased locomotive power; elimination or reduction of interchanges and the resulting delays; and a reduction in loss and damage claims as a result of less handling.

Shell also believes that the merger will permit it to move coal from the Powder River Basin to the gulf coast. It believes that this new market could prove extremely valuable.

Shell sees nothing wrong with the diversion of traffic from one railroad to another. It believes that the economy of this country should not support rail systems or railroads that are not able to generate enough traffic to be viable.

Nabisco, Inc., of East Hanover, NJ, supports the merger in principal, although it sees no specific benefit to Nabisco. Nabisco ships such goods as flour, bakery goods, dog biscuits, cereal, and cake mix. Nabisco pays approximately $60 million a year for rail transportation service.

Nabisco specifies routing on 100 percent of its shipments. It states that the service provided affects how it routes its traffic and that it generally provides the origin and destination railroads with long-haul service, particularly if the delivering railroad supplies equipment. Nabisco leases approximately 300 to 400 cars for shipping flour.

Nabisco believes that the merger would strengthen the Nation's rail network. It also believes that more reliable and consistent transit times and increased single carrier responsibility will result. Nabsico believes that the existing service of BN and Frisco will continue to be dependable. Nabisco points out that certain inherent advantages of the merger would be reduced switching, increased car supply, consolidation of management and work force, and greater financial strength.

Nabisco believes, however, that there are advantages to being served by more than one railroad.

Pacific Northwest Traffic League (PNTL), an informal association of over 200 shippers headquartered in Seattle, WA, supports the merger. Its main goal is to obtain favorable freight rates and satisfactory service.

PNTL has four major reasons for supporting the merger. The first is the expected lower cost to and from the South and Southwest from and to the Northwest. PNTL points out that there will be longer hauls, better car utilization, and added profitability for the system. It also points out that over 5 million BN-Frisco empty car-miles may be reduced on the return of empty cars. It states that the slow and costly interchanges at St. Louis and Kansas City should be improved and duplicative railroad offices in Seattle and Portland can be phased out. A route from Kansas City and Memphis to Birmingham and the south will shorten the routes which BN currently has through Centralia and Woodland, IL by between 72 and 268 miles.

Second, PNTL supports the merger because service to and from the Pacific Northwest can be improved. Third, PNTL supports the merger because competition between railroads will not be reduced. It points out that there are a number of competitive routes and gateways available in addition to the BN-Frisco system.

Fourth, PNTL supports the merger because it will bring Frisco into the Pacific Northwest. Currently, Frisco does not participate to a great extent because of the division it receives on traffic from the Pacific Northwest. As part of BN, Frisco would not be concerned with divisions at the eastern gateways.

PNTL believes that the merged company could divert a large amount of traffic destined to the South and Southwest from motor carriers. PNTL also believes that it is advantageous to have rates equalized near various routes. It believes that, despite the impacts of the merger, many viable rail competitors will remain to prevent the merged company from obtaining a monopoly position.

SHIPPERS IN SUPPORT OF KATY'S REQUEST FOR INDEMNIFICATION

The *Lower Colorado River Authority (LCRA)*, of Austin, TX, is an agency of the State of Texas which operates as an electric utility serving 1 million people in the central Texas area. LCRA has two coal-fired generating plants near La Grange, TX. The plants use low sulfur subbituminous coal from Montana and Wyoming. One plant went on line in 1979. The second is scheduled to begin operations in 1980.

LCRA owns 1,000 cars (and expects to purchase 100 to 200 more cars) which make up the unit coal trains serving it since 1978. The trains originate on BN at Decker, MT, and run through Wyoming and Colorado to Fort Worth, where they are turned over to Katy for delivery to La Grange. LCRA expects to require coal at La Grange for 25 years. It uses about 20 million tons per unit annually.

Katy is the only carrier serving the La Grange plants. A study conducted by LCRA when the plant was planned concluded that a spur connection with Katy, rather than SP which is located 10 to 12 miles from the plant, would be more economically feasible. LCRA built the spur and Katy recently rehabilitated its own line from Fort Worth serving La Grange.

LCRA is not opposed to the merger, but is concerned with its possible harmful effect on Katy and Katy's ability to provide adequate service.

La Barge, Inc., Tubular Division, of St. Louis, MO, is a manufacturer and distributor of steel pipe. It has plants in St. Louis, Bellview, OH, and Wagoner, OK, and owns warehouses in Memphis, New Orleans, Houston, and Los Angeles. Its business is growing and it has had to expand its plants to meet current and future needs of customers. It requires 52-foot gondola cars and, at times, specialized equipment to haul exotic sized pipes.

The Wagoner plant's sole rail carrier is Katy. Katy's service is considered outstanding and has met the special equipment needs. For the past 2 years Katy has

handled over 1,150 carloads in and out of the plant representing over one-half of the total tonnage shipped and received there.

No La Barge plant is served by BN or Frisco, yet La Barge is opposed to the merger because it believes Katy would suffer revenue losses which would be detrimental to its ability to render adequate services.

La Barge supports Katy's request for indemnification, whether or not other conditions to protect Katy are imposed, to cover revenue losses and prevent reduction in Katy services.

Breton Corporation and *Clareden, Inc.*, both of Kansas City, MO made a joint statement. Breton is engaged in handling and warehousing in the Kansas City foreign trade zone, handling inbound traffic in containers on behalf of 40 corporations. Its customers give Breton their sales orders to fill by repackaging or shipping full containers out over the Kansas City-Galveston-Houston corridor.

Clareden is a transportation consulting firm that guides inbound and outbound transportation and the distribution of goods for its accounts. Claredon routes 1,500 to 2,000 carloads and truckloads annually throughout the United States. The origin, destination, nature of the commodity and transit time determine the mode and route of transportation selected.

Both Breton and Clareden promote import merchandise in the Kansas City foreign trade zone. In 1978 Breton received 700 import containers at Kansas City. With respect to that traffic, Katy moved 97 to 98 percent, and Santa Fe the remainder. Traffic to Kansas City in the Kansas City-Galveston-Houston corridor is expected to double annually, reaching 5,000 containers in 5 or 6 years. Breton owns no rail equipment. It intends to utilize Katy's services as long as the service remains good, since it is less expensive to ship container traffic by rail. Two-container rates for rail are about $780, less than the rate by truck for a single container.

Breton's and Clareden's opposition to the merger is based on the expected diversion of Katy traffic, resulting in financial impairment and reductions in service for Katy. The companies support Katy's request for indemnification because they fear Katy's service would otherwise deteriorate. Both companies believe they receive better, more personalized service from smaller carriers such as Katy.

The *Denison Area Chamber of Commerce*, of Denison, TX, promotes economic development in its area. Denison's economy is largely dependent on Katy, which has a large division installation in the community. Presently, 800 people in Denison and the surrounding area are employed by Katy. The direct Katy payroll in Denison is $13 million annually, the largest in the community. Financial collapse of Katy would have disastrous effects in Denison.

The Chamber is opposed to the merger because of the possible adverse effect on Katy and in turn on Denison area business and employment. It supports Katy's request for indemnification, as well as a requirement that the merged company continue to deliver to Katy the same amount of traffic the two companies now deliver.

Gifford-Hill & Co., Inc., of Dallas, TX, is a diversified construction materials company. It has purchased coal along the Katy main line in Oklahoma for shipment to its cement plant at Midlothian, TX, 30 miles from Dallas. The plant uses 200,000 tons of coal annually. Katy ships the coal from origin to destination. Several other railroads provide other transportation services for Gifford-Hill.

Gifford-Hill is concerned that the merger would cause deterioration in Katy's service. It supports Katy's request for indemnification so that Katy can continue to provide adequate service.

SHIPPERS IN SUPPORT OF ROCK ISLAND CONDITIONS

Riceland Foods, of Stuttgart, AR, produces, processes, and markets rice, soybeans, and other agricultural commodities. Its Stuttgart plant is served by the Rock Island and Cotton Belt railroads, and its use of rail service at the plant was projected to reach 28,381 jumbo hopper carloads during 1979. It seeks denial of the merger due to the anticipated impact on Rock Island. Rock Island provides extensive service to Riceland's Stuttgart plant on export traffic to Texas ports and numerous local Rock Island points. Riceland states that such service is an economic necessity to its Stuttgart operation.

Superior Cooperative Elevator Company, of Superior, IA, operates a grain elevator in the grain producing northwestern quadrant of Iowa. It is served by Rock Island and loads between 4 and 5 million bushels of train a year for rail transportation, primarily to Houston, TX for export. It seeks denial of the merger based on the anticipated detrimental effects on Rock Island.

Adolph Coors Company, of Golden, CO, is the Nation's fifth largest brewer. Seventy-five percent of Coors' production moves by rail to 16 States. In 1978, 19,524 carloads moved outbound and 11,339 cars moved inbound. Coors is presently served by C&S, a BN subsidiary, to Denver. Traffic is then allocated among the delivering railroads according to a Coors policy based on the individual railroad's contribution to the Coors equipment pool and the service provided. Coors supports the imposition of Rock Island's condition allowing entrance to Golden, CO, to provide competition to C&S as origin carrier. Coors is in opposition to the merger itself.

SHIPPERS IN SUPPORT OF MILWAUKEE ROAD CONDITIONS

Western Energy Company, of Butte, MT, is a coal mining company which produces 17 million tons of coal annually. It is wholly owned by Montana Power Company. It supports imposition of Milwaukee Road's request for access to BN's coalfields. It seeks imposition of this condition to: contribute to the financial health of the Milwaukee; provide alternative rail transportation to Montana coalfields; offset BN's present advantage as the originating carrier; and increase equipment available to shippers. Western Energy states no position on the merger itself.

Northern States Power Company, of Minneapolis, MN, is an electric utility consuming approximately 4.3 million tons of coal a year (3.4 million tons from Montana mines), at its Bayport, St. Paul, Minneapolis and Burnsville, MN powerplants. Its coal moves in BN unit trains to: the Minneapolis plant; barges for delivery to the Burnsville and Bayport plants; and the Milwaukee Road at St. Paul for delivery to the St. Paul plant. It seeks imposition of Milwaukee Road access to BN's coalfields to: achieve optimal transportation efficiency from Montana mines, due to the presence of alternative rail transportation; improve the financial conditions of Milwaukee Road to insure competition; and reduce coal rates due to competition. Northern States expresses no position on the merger itself.

Wisconsin Power and Light Company, of Madisor., WI, is an electric utility which consumes approximately 4 million tons of coal annually. Its coal is moved by rail to two coal-fired generating plants at Portage, WI, from mines at Colstrip, MT. The coal moves over BN to Miles City, MT, where 50 percent of the traffic is interchanged with Milwaukee Road. The balance is interchanged with Milwaukee Road at St. Paul for

delivery. It seeks imposition of Milwaukee Road access to BN's coalfields to: insure the maintenance of Milwaukee Road's line between Miles City, MT, and St. Paul, MN; and acquire the potential benefits of Milwaukee Road single-line service. Wisconsin Power and Light states no position on the merger itself.

SHIPPERS IN SUPPORT OF BEN AGAINST CONDITIONS

Termicold Corporation, of Portland, OR, freezes, stores, and distributes various frozen foods and other food products requiring refrigeration. It operates 15 warehouses in Idaho, Iowa, Oregon, Washington, and Wisconsin and handles 2 billion pounds annually. It uses BN rail service at its warehouse in Bettendorf, IA, located on the DRI&NW line. It seeks denial of Rock Island's requested operation of the DRI&NW line because its frozen foods shipments require the prompt service which it now receives from BN and which it fears it will lose if Rock Island service is substituted. Termicold states no position on the merger itself.

Lamb-Weston has a major in-transit distribution warehouse at Bettendorf, IA. It estimates that 1979 traffic in BN refrigerated cars between its plants and the Bettendorf warehouse amounted to 2,000 carloads. It urges denial of Rock Island's condition proposing ownership or operation of the DRI&NW line. It seeks to preserve its present single-line service by BN and maintain its present supply of refrigerated equipment.

Aluminum Company of America, of Pittsburgh, PA, produces aluminum sheet, plate, and foil at its Riverdale, IA, plant. At that plant, 9⅔ percent of the inbound tonnage and 33 percent of the outbound tonnage moves by rail. Over half of these movements involve BN, with 15 percent BN local traffic, while less than 1 percent involves Rock Island. It seeks denial of Rock Island's condition seeking substitution of BN on the DRI&NW line. It does not object to reciprocal switching. It believes the present service is satisfactory and that substitution of a bankrupt carrier would weaken its competitive position. It states no position on the merger itself.

APPENDIX D

Summary of BN traffic, facilities, equipment, safety, and financial data

TRAFFIC

BN's freight traffic over the 1970-76 period consisted of approximately 36- to 39-percent local traffic, 34- to 38-percent interline originated, 17- to 19-percent interline terminated, and 8- to 10-percent overhead. Despite a net 7-percent drop in the number of carloads hauled between 1970 and 1976 (2,601,173 to 2,420,159), total revenue-tons rose 11 percent, increasing from 134.1 to 149.0 million. BN's average length of haul increased annually during the period, rising from 421 miles to 569 miles. Reflecting these increases in tons carried and average length of haul, BN's revenue ton-miles rose 50 percent increasing from 56.5 billion to 84.7 billion. Total freight revenues increased 86.4 percent over the period, totaling $1.5 billion in 1976.

Between 1970 and 1976, coal gradually replaced farm products as BN's most important commodity. Coal revenues and tonnage, which accounted for 17.5 and 30.8

percent of BN's 1976 revenue and tonnage, respectively, increased from $42.2 million to $226.9 million and from 21.3 million tons to 45.9 million tons. Other major 1976 revenue producing commodities included: farm products (17.3 percent of revenue and 16.4 percent of tonnage); lumber or wood products, except furniture (15.1 percent of revenue and 9.7 percent of tonnage); food and kindred products (9.9 percent of revenue and 8.5 percent of tonnage); chemicals or allied products (5.4 percent of revenue and 6.0 percent of tonnage); and pulp, paper, or allied products (5.2 percent of revenue and 3.5 percent of tonnage).

Carloads hauled by C&S and FW&D increased between 1967 and 1976, with C&S's traffic increasing 46.4 percent (111,536 carloads to 163,258) and FW&D's increasing 15.6 percent (99,110 to 114,561). Revenue-tons, revenue ton-miles, and freight revenue also increased for both roads, with C&S's tonnage increasing from 5.6 million to 11.3 million, ton-miles increasing from 1.1 billion to 2.1 billion, and freight revenue increasing from $14.5 million to $47.0 million. Tonnage, ton-miles, and freight revenue for FW&D, increased from 4.9 million to 7.7 million, 1.5 billion to 2.3 billion, and $18.6 million to $43.2 million, respectively.

OT's revenue-tons, ton-miles, and freight revenue, for 1971-76, increased from 3.6 million to 3.7 million, 511.2 million to 534.9 million, and $4.9 million to $7.9 million, respectively. OE's traffic statistics, on the other hand, generally declined between 1971 and 1976. As total carloads decreased from 36,522 to 26,460, revenue-tons dropped from 1.6 million to 1.2 million and revenue ton-miles fell from 177.6 million to 132.3 million. Freight revenue did increase, however, from $6.4 million to $6.9 million. Food and kindred products consistently remained C&S's principal revenue producing commodity between 1967 and 1976, accounting for 33.3 percent of its 1976 freight revenue. Farm products and metallic ores ranked second and third until 1976, when coal became C&S's second greatest revenue producing commodity. These four commodities accounted for 74.1 percent of C&S's 1976 revenue tonnage with coal being the greatest contributor with 33.6 percent.

Farm products and food and kindred products ranked as FW&D's first and second most important commodities, respectively, in each year between 1967 and 1976. In 1976, these two commodities accounted for 39.5 and 20.2 percent of FW&D's freight revenue and 40.3 and 19.6 percent of its tonnage, respectively.

Lumber and wood products, except furniture, was the principal commodity for OE and OT between 1970 and 1976, representing 61.2 and 67.7 percent of OE's 1976 freight revenue and tonnage and 45.0 and 34.5 percent of OT's 1976 freight revenue and tonnage.

Classes of traffic for the C&S, FW&D and OE are shown in table D-1.

TABLE D-1

Classes of traffic

	C&S		FW&D		OE	
	1967	1976	1967	1976	1970	1976
	Percentage					
Local	2.6	1.9	18.5	15.2	3.5	4.2
Interline originated	22.0	20.2	21.0	14.1	77.8	77.9
Interline terminated	27.7	37.0	32.9	39.7	18.5	17.7
Overhead	47.7	40.0	27.6	31.0	0.2	0.2

Burlington's system is comprised of a vast and complex route structure resulting from the unification of its predecessor companies. To facilitate an understanding of the proposed transaction from an operating standpoint, a brief description of BN's existing operations is necessary. The data discussed in this description are for the year 1976.

The principal traffic flows over BN's so-called transcontinental lines between Chicago and the Northwest are shown in condensed schematic form in appendix O, chart A. The gross tons per mile figures on this chart represent the total of the traffic flows in both directions. Through traffic west of the Twin Cities is moved mostly over the former GN line via Minot, ND, while the former NP line via Bismark, ND, carries substantial volumes of coal from feeder lines at the junction points of Huntley, Sarpy Junction, and Nichols, MT.

The principal traffic flows in Washington are from Spokane to Seattle via Everett (the former GN line), from Spokane to Portland, OR (the SP&S line), and from Portland to Seattle. The line from Wishram, WA to Bieber, CA, is part of the BN-WP-Santa Fe "inside gateway route" to southern California. On this line, BN operates over SP lines between Klamath Falls and Chemult, OR, and over UP lines between Metolines and South Junction, OR. The Wishram-Bieber line is owned and operated by BN's subsidiary, OT.

The Bieber gateway accounted for 51,534 carloads interchanged between BN and WP in 1976. Over 45,000 of these moved between the Southwest[1] on the one hand, and, the Northwest and British Columbia on the other hand. Of the total carloads interchanged, 41,679 either originated or terminated on BN.

At Klamath Falls, BN interchanges traffic with SP. In 1976, this traffic amounted to 18,289 carloads, including 13,227 which originated on BN. The interterritorial movement of the bulk of this traffic is similar to that described above for the Bieber gateway.

At Spokane, BN interchanged: 5,061 carloads with UP (of which over 4,000 either originated or terminated on BN); 4,147 carloads with UP's subsidiary Spokane International (of which 3,083 terminated on BN); and 1,642 carloads with Milwaukee Road (of which 1,424 either originated or terminated on BN).

Of the 10,850 carloads interchanged at Spokane, over 4,000 moved wholly within the area comprised of the Northwest, British Columbia, and Saskatchewan.

[1]The definitions of the geographic regions mentioned in this decision are in appendix L.

At Portland, BN interchanged 80,049 carloads with SP (21,617 originated on BN, 45,034 terminated on BN, and 13,398 were overhead to BN). At least 16,000 carloads moved wholly within the Northwest, and over 40,000 of the BN-SP carloads moved between the Northwest and the Southwest. BN interchanged 8,124 carloads with UP at Portland, of which 7,219 carloads terminated on the BN. Over 6,800 carloads interchanged between BN and UP moved wholly within the Northwest. Also at Portland, a relatively small interchange (778 carloads) took place between BN and the Milwaukee Road, in 1976.

At Miles City, MT, BN interchanged 11,920 carloads with the Milwaukee Road, nearly all of which originated on BN. BN interchanged approximately 3,000 to 3,500 carloads each with the UP and the Butte, Anaconda & Pacific Railway at Butte, MT, while Milwaukee Road and BN interchanged 16 cars. At Silver Bow, MT, BN interchanged 8,303 carloads with UP and only 2 carloads with Milwaukee Road. In North Dakota, BN and CNW interchanged 7,915 carloads at Oakes, and Soo Line and BN interchanged 50 carloads. Most of the BN-CNW carloads originated on BN.

In addition to the Twin Cities and the Twin Ports (Duluth-Superior) gateways, BN has several gateways at which substantial amounts of Canadian traffic are interchanged. In British Columbia, such traffic is handled through the Vancouver, North Vancouver, New Westminster, and Sumas gateways. The number of carloads interchanged with Canadian railroads at these gateways in 1976 are listed in table D-2.

TABLE D-2

Carrier	Carloads
Canadian National Railways	13,982
Canadian Pacific	9,355
British Columbia Hydro and Power Authority	6,494
British Columbia Railway	15,949

CP and BN also interchanged 9,589 carloads at Sweet Grass, MT, and another 3,267 carloads at Winnipeg, Manitoba. At the latter gateway, BN and CN interchanged 2,841 carloads.

In Minnesota, BN interchanged 4,213 carloads with CN and another 2,943 with CP at the Noyes gateway. At International Falls, MN, BN interchanged 9,462 carloads with two short lines which connect with CN in Fort Frances, Ontario.

There are three major BN interchange points within the Twin Cities area—Minneapolis, St. Paul, and Minnesota Transfer. BN's 1976 carload interchange data for these points are summarized in table D-3, below:

TABLE D-3

BN Twin Cities interchanges

Connecting carrier	Originated on BN	Terminated on BN	Overhead	Total
CNW	19,383	6,964	4,724	31,071
Milwaukee Road	27,377	3,212	2,701	33,290

BN Twin Cities interchanges—Continued

Connecting carrier	Originated on BN	Terminated on BN	Overhead	Total
Rock Island	3,948	2,437	2,434	8,819
MN&S	4,478	2,141	3,335	9,954
Soo Line	10,925	8,226	5,447	24,598
Total	66,111	22,980	18,641	107,732

Over 60 percent of all BN traffic interchanged through the Twin Cities gateway originated on BN lines. With respect to the BN-Milwaukee Road traffic, the comparable figure is over 80 percent; for BN-CNW, over 60 percent; and for BN-Soo Line, over 40 percent. When traffic terminated on BN is combined with the traffic originated on BN, the total (89,091 carloads) represents over 80 percent of the 107,732 carloads interchanged by BN and its connecting carriers.

Two geographic traffic flows are of considerable magnitude in the Twin Cities interchanges of BN. More than 11,000 carloads interchanged with CNW and over 5,500 interchanged with the Milwaukee Road moved wholly within the North-Central States. Second, and of even larger volume, the eastward flow of traffic from the Northwest to the North-Central States amounted to over 7,000 carloads of the BN-CNW interchange and nearly 20,000 carloads of the BN-Milwaukee Road interchange. The geographic distribution of the remainder of the 107,732 carloads interchanged by BN at the Twin Cities was rather widely dispersed among pairs of origin-destination regions.

North of the Twin Cities BN handles substantial movements, primarily iron ore and taconite traffic, to the Twin Ports from points west. Details of the traffic density on BN routes in the area bounded by the Twin Cities, Minot, and Bismarck are shown schematically in appendix O, chart B. In 1976, BN interchanged nearly 19,000 carloads with connections at Duluth, principally the DW&P (a CN subsidiary), with whom over 12,000 carloads were interchanged. Less than 300 carloads each were interchanged with CNW, the Milwaukee Road, and Soo Line at Duluth.

The BN system through the central corridor is comprised of the lines of the former CB&Q. Connecting with these routes in Wyoming and Colorado is the north-south line of C&S, which extends southward to Texline (NM and TX) and its connection with the FW&D route to Galveston. The heaviest density lines in this region are schematically presented in appendix O, chart C.

Chart C reveals the complex intermingling of traffic on several main routes. As examples, the Chicago-Denver route via Pacific Junction (south of Council Bluffs) and Lincoln is also utilized in part by traffic to and from: (1) the Twin Cities via Savanna, IL and via Willmar, MN; (2) Kansas City via Galesburg, IL, on the east and via either Pacific Junction or Oreapolis and Lincoln, NE, on the west; (3) St. Louis and East St. Louis via Burlington, IA and via Galesburg; and (4) Laurel and Huntley, MT. The Huntley-Gillette-Alliance-Lincoln route handles much of the Wyoming coal traffic.

Also shown on chart C is the interrelationship of the traffic flows over the various connecting routes between the Twin Cities, Chicago, Peoria, Kansas City, St. Louis-East St. Louis, and Paducah, KY. Traffic between Chicago and all points in the entire BN system moves over the segment of line between Chicago and Aurora, IL.

The principal gateway at the western end of BN's central corridor routes is Denver. In 1976, BN interchanged 115,394 carloads at Denver, of which 60,595 were with C&S.[2]

The following carloads were interchanged at Denver with carriers other than C&S: UP, 3,472; Rio Grande, 47,926; Rock Island, 194; and Santa Fe, 3,207. Over 22,000 of the carloads interchanged with Rio Grande moved between the Southwest and the Northeast, and more than 9,000 moved between the Southwest and the North-Central States.

C&S's principal connection at Denver (other than BN) is UP, with which 13,323 carloads were interchanged in 1976. C&S also interchanged 7,013 carloads with Rio Grande; 4,988 with Rock Island; and 3,772 with Santa Fe. Over half of the C&S-Rio Grande interchange involved movements having both origin and destination in the Southwest. Nearly half of the carloads interchanged between C&S and UP also moved wholly within the Southwest. Approximately 45 percent of the traffic interchanged between BN and C&S involved movements from the Northwest to the Southwest.

At Pueblo, CO, C&S interchanged about 11,000 carloads in 1976, almost evenly divided among Santa Fe, Rio Grande, and Mopac.

C&S meets with FW&D at Sixela, NM-Texline, TX. At Sixela in 1976, the two carriers interchanged over 45,000 carloads, of which nearly 31,000 were overhead movements on C&S. Some 15,000 carloads originated in the Northwest and terminated in the South-Central States, primarily Texas.

The principal gateways on FW&D (other than Sixela) are in Dalhart, Dallas, Fort Worth, and Irving, TX. At Dalhart, FW&D's only connection is the Rock Island, with which 9,444 carloads were interchanged in 1976, nearly all handled by FW&D as overhead traffic. Over 3,000 of these carloads originated in Colorado and terminated in California.

FW&D's interchange at Dallas is rather small—in 1976 it amounted to 5,261 carloads. Of these, 2,761 were interchanged with L&A, a subsidiary of KCS. All other connecting carriers at Dallas interchanged less than 900 carloads each with FW&D.

Fort Worth is the largest single interchange point for FW&D (other than with its parent C&S at Sixela). Over 24,000 carloads were interchanged in 1976, including over 10,000 carloads with SP and its subsidiary, Cotton Belt. Another 7,426 carloads were interchanged with Mopac. The remainder were interchanged with Santa Fe (1,767), Rock Island (847), Katy (2,527), and Frisco (11,221). FW&D's only connecting carrier at Irving is Frisco, with which 11,428 carloads were interchanged. Of these, 10,620 terminated on FW&D.

Viewed collectively, the Dallas, Fort Worth, and Irving gateways in 1976 accounted for the interchange by FW&D of more than 40,000 carloads. Over 13,000 of these moved wholly within the South-Central States. Also, approximately 3,500 to 4,000 carloads each moved between the South-Central States and (1) the Northwest, (2) the Northeast, and (3) the North-Central States. Additionally, over 5,000 carloads moved between the Southwest and the South-Central States. In short, the bulk of the traffic interchanged at the Dallas, Fort Worth, and Irving gateways had an origin and/or destination in the South-Central States.

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[2] It should be noted that C&S data filed in the same application show that 55,627 carloads were interchanged between C&S and BN. This discrepancy is not unusual with respect to interchange data. Similar discrepancies appear in data provided by other carriers including Frisco. Presumably, these discrepancies are the result of the varied recordkeeping practices of individual carriers and are neither misrepresentations nor mistakes. Such discrepancies are not considered material to our discussion of the relative magnitudes of interchange volumes between a carrier and its connections at particular gateways.

Referring again to the central corridor proper, BN's first major gateway east of Denver is Grand Island, NE, located 30 miles east of Ravenna, NE. Grand Island in 1976 was the point of interchange for over 61,000 carloads between BN and UP. Of the total, approximately 24,000 originated on BN and 23,000 moved as overhead traffic. About half of the BN-UP carloads move between the Northeast and the Southwest, including over 15,000 carloads originating in Illinois and terminating in California. About 14,000 carloads moved between the Northeast and the Northwest. Traffic to and from the Southeast amounted to only about 1,500 carloads in 1976.

Two smaller BN gateways in Nebraska are Crawford, located northwest of Alliance, and Superior, located south of Grand Island near the Kansas border. Each of these gateways in 1976 was the point of interchange for roughly 6,000 BN carloads. The Crawford interchange was exclusively with CNW, and nearly all of the Superior interchange was with Santa Fe.

The Omaha and Council Bluffs gateways combined accounted for the interchange of 34,4000 BN carloads. The UP accounted for nearly 14,000 carloads, while CNW interchanged 7,640 and Mopac, Rock Island, Milwaukee Road and ICG each interchanged 2,000 to 4,000 carloads with BN. Over 4,500 of the BN-UP carloads moved between the Southwest and the Northeast. The remainder of the traffic interchanged by BN at Omaha-Council Bluffs was rather widely distributed among pairs of regions.

In volume Kansas City is second only to Chicago as a major interchange point for BN. Nearly 148,000 carloads were interchanged with BN's 11 connections at Kansas City. Of the total carloads, almost 90,000 originated on BN and nearly 33,000 terminated on BN. The BN-Frisco interchange at Kansas City amounted to slightly over 28,000 carloads, of which 16,000 originated on BN and almost 6,000 on Frisco. Over 25 percent of the BN-Frisco carloads terminated on BN and over 40 percent terminated on Frisco.

BN's largest-volume connection at Kansas City was Mopac (33,000 carloads), followed by Frisco (28,000) and Santa Fe (over 27,000). Rock Island and Katy each interchanged 13,000 cars with BN. The BN-Rock Island traffic included 10,096 cars originated on BN; the comparable figure for Katy traffic was 9,455. UP and ICG interchanged 3,900 and 2,118 cars with BN, respectively, while the total of N&W was almost 7,000. Milwaukee Road and CNW interchanged less than 500 carloads each with BN.

The two largest interregional movements involving the 148,000 carloads interchanged by BN at Kansas City were: between the North-Central States and the South-Central States (over 44,000 carloads); and between the Northwest and the South-Central States (over 24,000 carloads). From 5,000 to 10,000 carloads moved (in each case) between: the Northeast and the South-Central States; the Northwest and the Southeast; the Northeast and the Southwest; and the Southwest and the North-Central States. Over 6,000 carloads moved wholly within the South-Central States. These traffic flows illustrate the hub-like characteristics of the Kansas City gateway in relation to the BN system.

At the eastern end of the BN system, there are several major gateways which serve both the northern and central corridor routes. These gateways, other than St. Louis, are all in Illinois-Bushnell, Centralia, Chicago, Canton, Congress Park, Eola, St. Louis, Galva, Peoria, Virden, and Woodlawn. The Bushnell, Canton, Congress Park, and Eola gateways involve connecting carriers which are Chicago area belt railroads or which bypass the Chicago area entirely. None of these connecting carriers participated in this proceeding.

In 1976 BN interchanged almost 36,000 carloads at St. Louis and over 14,000 at St. Louis. Of the combined St. Louis area total of 50,000 cars, over 11,000 were interchanged with Frisco. Mopac, ICG, and Cotton Belt each interchanged roughly 7,000 to 8,000 carloads with BN, while L&N and Southern interchanged 3,867 and 2,480 carloads, respectively. Katy, Rock Island, and CNW volumes amounted to about 1,000 carloads each. Approximately 80 percent of the traffic interchanged by BN at St. Louis and East St. Louis either originated or terminated on BN lines.

Very little (approximately 1,000 carloads) of the BN's St. Louis area interchange traffic and origin or destination in the Northwest. The largest portion of the St. Louis-East St. Louis traffic moved between the Northeast and the South-Central States (over 12,000 carloads). This traffic includes over 5,000 cars interchanged with ICG which originated in Illinois and terminated (mostly on BN lines) in Missouri.

Approximately 8,000 out of the 50,000 carloads interchanged in the St. Louis area moved to or from the Southeast. This traffic, however, was widely distributed among the other regions of the United States. Almost 75 percent of the Southeast traffic was interchanged between BN and Frsico.

The BN interchange volume at Peoria amounted to almost 59,000 carloads in 1976, the bulk of which was interchanged with eastern district railroads. Among the carriers which participated in this proceeding, Illinois Terminal, ICG, Rock Island, CNW, and Santa Fe have connections with BN at Peoria. The BN-ITC interchange amounted to 2,263 cars, and the BN-ICG volume was 1,528 cars. Interchanges with CNW, Rock Island, and Santa Fe were less than 700 cars each.

Rock Island and BN interchanged 5,205 carloads at Galva, all but 2 of which terminated on BN. Nearly all of this traffic originated in Illinois and terminated in Iowa.

Burlington and CNW interchanged 9,110 cars at Virden, all of which originated on BN in Illinois and terminated in Wisconsin.

BN's Centralia and Woodlawn gateways are located on the line to Paducah. The Woodlawn gateway involves only BN and L&N, and in 1976, almost 30,000 carloads were interchanged. Nearly 80 percent of the traffic either originated or terminated on BN.

The Centralia gateway involves BN interchanges with ICG, Southern, and Mopac. (In 1976, Mopac's former subsidiary, Missouri-Illinois, interchanged only 911 carloads with BN.) The BN-Southern traffic amounted to about 37,000 cars, over 70 percent of which originated or terminated on BN. The BN-ICG interchange consisted of about 17,000 carloads, almost 95 percent of which originated or terminated on BN.

Considering the Centralia and Woodlawn gateways on a combined basis, several major traffic flows are discernable: (1) almost 20,000 carloads moved between the North-Central States and the Southeast in 1976; (2) over 15,000 cars moved between the Northwest and the Southeast; (3) over 5,000 cars moved between Canada and the Southeast; and (4) about 4,000 cars moved between the South-Central States and the Southeast. In short, over two-thirds of BN's Centralia and Woodlawn interchange traffic moved to or from the Southeast.

Almost 90 percent of the 256,116 carloads BN interchanged in 1976 at Chicago were with eastern district railroads. Most of that traffic had its origin and/or destination in the area comprised of the Northeast, Virginia, West Virginia, and the Canadian Provinces east of and including Ontario.

Of the 256,116 carloads interchanged at Chicago, 134,818 originated on BN, 59,236 terminated on BN, and the balance was BN bridge traffic.

The BN's Chicago interchange volumes for railroads participating in this proceeding are shown in table D-4.

TABLE D-4

Railroad	Cars interchanged at Chicago
ATSF	4,213
CNW	3,229
Milwaukee Road	2,823
Rock Island	193
ICG	5,255
L&N	6,247
Mopac-CEI[1]	2,113
Soo Line	3,278

[1]CEI was merged into Mopac during 1976—the figure shown is the total for CEI and MP for the full year.

The geographic distribution of this traffic is slightly diverse, with the exception of BN-Santa Fe traffic. The 4,213 carloads interchanged between BN and Santa Fe included over 3,500 which moved from the Northeast to the Southwest.

As stated earlier, BN's freight traffic over the 1970-76 period primarily consisted of movements which originated and/or terminated on BN lines—only 8 to 10 percent were bridge movements. Subsidiaries C&S and FW&D have larger amounts of bridge traffic, reflecting in part their end-to-end relationship with BN in Colorado and Wyoming and connections with other railroads in Texas.

Data covering carload volumes originated or terminated at major stations on the BN system were included in the application. These data are for stations at which either 5,000 carloads or 5 percent of total carloads (whichever is less) either originated or terminated. Under Commission regulations, stations may be excluded from the listing if the data would reveal the identity of shippers or receivers.

For BN itself, the 5,000-car cutoff for the listing of stations is applicable, whereas for the much smaller subsidiaries, the 5 percent of total carloads cutoff applies. As a result, some BN stations were not included in the application listing even though such stations may have had greater carload volumes than those shown for BN's subsidiaries. For purposes of this discussion the differences in statistical treatment are neither significant nor material. The data have been summarized in table D-5 below to portray the relative magnitude of the traffic origins and terminations on a State-by-State basis. States or Canadian Provinces served by the BN system but not listed in the table had no stations with traffic volumes sufficient to qualify for listing in the application. To the extent that local traffic is involved, some of the originated carloads shown in table D-3 also appear as terminated carloads in the second column.

TABLE D-5

BN and subsidiaries: Carloads originated and terminated at major stations, summarized by State, year 1976

State or Province	Carloads	
	Originated	Terminated
British Columbia	11,136	10,676
Colorado	29,372	80,846
Idaho	6,173	----------
Illinois	214,366	104,690
Iowa	13,187	24,206
Kentucky	----------	10,726
Minnesota	142,865	192,633
Missouri	37,135	89,887
Montana	270,634	47,773
Nebraska	41,990	58,250
North Dakota	34,607	34,660
Oregon	44,563	48,587
Texas	17,491	48,405
Washington	130,182	234,961
Wisconsin	5,863	147,083
Wyoming	85,109	----------
Total	1,084,673	1,133,383

The preponderance of BN originations and/or terminations occur in Illinois, Minnesota, Montana, Washington, and Wisconsin. Major points in these States contributed represent almost 60 percent of the total BN system originations in 1976, and nearly 75 percent of total terminations.

The commodity mix of BN freight traffic has remained relatively stable since 1970 with two exceptions. First, farm products have declined from the greatest contributor to total revenues and for 1977 represent 14.11 percent of revenues, or the third largest revenue producer. Second, coal has grown significantly, contributing 21.41 percent of the gross freight revenues for 1977, making it the largest contributor to total revenues, up from 5.3 percent of revenues in 1970.

Lumber and wood products contributed 14.75 percent of gross freight revenues for 1977.

Coal traffic, which has grown over 170 percent from 18.7 million tons originated in 1970 to 50.6 million tons originated in 1977, is expected to continue to increase as demand for a domestic energy supply increases. BN estimates that the carrier will originate about 125 million tons of coal by 1981.

BN's coal business has developed along three main corridors—a northern, a central, and a southeastern—with a fourth corridor to the northwest scheduled to handle its first major coal unit train in about a year.

BN's tonnage originating on line has been increasing and for 1977 constituted 81 percent of total tonnage. The increase in originating tonnage is attributed to the increased western coal production.

BN participates in a number of run-through trains. Table D-6 contains a list of 1978 BN run-through trains.

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TABLE D-6

BN run-through train operations

	Origin-destination	Route and junction	Market territory
	Each direction		
X	Seattle, WN-Barstow, CA	BN-Bieber-WP-Stockton-ATSF	Note 1
X	Galesburg, IL-Nashville, TN	BN-Woodlawn, IL-L&N	Note 2
X	Galesburg, IL-Louisville, KY	BN-Centralia, IL-Southern	Note 2
X	Chicago, IL-North Platte, NE	BN-Grand Island, NE-UP	Note 3

Unit coal trains

Loaded movement from origin to destination and return empty movement in opposite direction

	Mine origin	*Destination*	*Route and junction*
X	Black Thunder, WY	Fort Gibson, OK	BN-Kansas City-MP
X	Belle Ayr, WY	Amsterdam, MO	BN-Kansas City-KCS
X	Do	Flint Creek, AR	Do.
X	Do	Welsh, TX	Do.
X	Do	Columbia, WI	BN-Omaha-MILW
X	Colstrip, MT	do	BN-Miles City alternatively St. Paul-MILW.
X	Decker, MT	Joliet, IL	BN-Eola-EJ&E-Joliet-ICG
X	Do	Hammond, IN	BN-Eola-EJ&E
X	Do	Waukegan, IL	Do.
X	Kuehn, MT	Sommer, IL	BN-Bushnell-TP&W
	Decker, MT	Havana, IL	BN-Peoria-P&PU-C&IM
X	Belle Ayr, WY	Minnequa, CO	BN-Denver-C&S
X	Cordero, WY	Elmendorf (San Antonio), TX	BN-Denver-C&S-Texline-FW&D-Fort Worth-SP.
X	Belle Ayr, WY	Jeffrey, KA	BN-Northport, NE-UP
X	Carlinville, IL	Machens, MO	IT-Federal-BN
	Sesser, IL	Oak Creek, WI	BN-Virden-CNW
X	Girard, IL	Labadie, MO	BN-St. Louis-MP
X	Jacobs Ranch, WY	Smithers Lake (Houston), TX	BN-Denver-C&S-Texline-FW&D-Fort Worth-ATSF.
X	Black Thunder, WY	Amarillo, TX	BN-Denver-C&S-Amarillo-ATSF

Market territory served:
Note 1—Pacific Northwest and California.
Note 2—BN points and Southeast.
Note 3—Midwest and West.
X—Locomotive power run-through.

FACILITIES

BN's principal terminal and yard facilities are located at Chicago and Galesburg, IL; St. Louis; Kansas City; Minneapolis; Lincoln; Denver; Laurel; Minot, ND; and Spokane. Its main locomotive shop and repair facilities are at W. Burlington, IA;

Livingston, MT; and Hillyard (Spokane). Its main car shop and repair facilities are at Como (St. Paul), St. Cloud, and Brainerd, MN; Havelock, NE; and Hillyard.

Mileage.—The average mileage of roads operated as of December 31, 1977, was 22,457 miles. Despite a pattern of reducing mileage since 1971, BN is not involved in any mass abandonment program. As of December 31, 1977, BN had identified about 1,500 miles of track for abandonment.

Maintenance of way.—As shown on table D-14 the expenditures for maintenance of way and structures have risen steadily from $127.4 million in 1970 to $283.3 million in 1976, an increase of over 122 percent. When these expenditures are reviewed on an equated track-mile basis an even greater increase is evident. These expenditures for 1976 were 18.43 percent of operating revenues, while the industry average was 16.53 percent. BN reported a maintenance ratio of 19.65 percent for 1977, with actual expenditures at $329.6 million.

To adjust for inflation we have converted those expenditures into 1967 dollars by using the "Indices of Railroad Material and Wage Rates" published by AAR. In constant 1967 dollars the expenditures per equated track-mile rose in each year except recessionary 1975, resulting in an increase of approximately 25 percent from 1970 to 1976.

BN's crosstie replacement program has increased and the percentage of crossties replaced to total ties has risen from 1.27 percent in 1970 to 2.94 percent in 1976. (See table D-15.) Under average conditions the life of a tie is estimated to be 40 years. Consequently, an adequate level of replacement is about 2.5 percent of total ties per year. However, 1976 was the first year of the period under study in which BN's tie replacement rate reached that level. The percentage of crossties replaced to total ties was over 3 percent for both 1977 and 1978.

In recent years BN has been laying about 250 track-miles of new rail per year. Its rail replacement programs have increased greatly, with 893 track-miles of rail replaced in 1976, representing 4 percent of the average miles of road operated for the year. The average life of rail is estimated to be 50 years, which translates into an adequate replacement level of about 2 percent per year. This carrier has equaled or surpassed 2 percent five times during the 7-year period. Rail replacement for 1977 and 1978 was over 1,000 miles, more than 4 percent of total track-miles.

The average weight of new rail laid was 129 pounds in 1976 and 31 pounds in 1978.

The current expenditures for maintenance of way and structures are within the parameters used to identify average maintenance needs. However, prior years' maintenance deficiencies could accumulate and hinder the efficiency of the system if not corrected.

Although current maintenance expenditures appear adequate, considering average needs, this carrier has just experienced a rather large increase in coal traffic. The shipment of coal causes more wear and tear to track than merchandise freight service. Therefore, higher maintenance is necessary when a large portion of the commodity mix is composed of coal or similar commodities, especially when transported by unit trains.

Much of the work done since the *Northern Lines Merger* has been concentrated on the 2,136-mile central corridor, with more than 623 miles of rail laid, more than 2 million crossties inserted, more than 2.1 million cubic yards of ballast applied and approximately 420 miles of centralized traffic control installed. The other major coal corridors have also received considerable attention.

The largest part of current roadway maintenance expenditures is on the four main rail corridors that handle the heaviest share of the company's merchandise and

commodity traffic and all unit coal train movements from the mines of Montana and Wyoming. With such large expenditures applied to the four main corridors, this trackage should be in adequate operating condition.

In the period 1972-76, BN's roadway capital spending on coal-related improvements amounted to about $87 million, including $42 million during 1976. For the 1977-78 period, BN is projecting coal-related roadway expenditures of $765 million, of which $525 million will be capitalized.

Train performance.—Table D-19 presents selected train performance data for the period 1970-78, measured in transportation units produced, equipment utilization and average train speed. It demonstrates that:

Net tons per train-mile have consistently increased (except for a slight decline in 1978);
The average number of freight cars per train increased from 69.0 to 72.3;
The average number of loaded freight cars per train rose from 38.0 to 40.3;
The average tons per loaded car have consistently increased, to 68.0; and
The average train speed has remained relatively stable.

Gross and net ton-miles per freight train-hour are presented in table D-20 to indicate BN train performance. By combining these load and speed factors, transportation output per train-hour can be examined. Between 1970 and 1976 gross ton-miles per freight train-hour increased by 31.7 percent, while net ton-miles per freight train-hour increased by 46.9 percent. The results for 1978 represent a decline from 1977, yet the carrier's performance was better than both western district and class I averages in both categories.

Additions and betterments.—The expenditures for additions and betterments for roadway increased annually from 1970-78, while equipment expenditures varied. Major acquisitions were made for locomotive and freight cars in years of large expenditures.

TABLE D-7

Expenditures for additions and betterments

	1970	1971	1972	1973	1974	1975	1976	1977	1978
					Millions				
Roadway	$22.9	$31.7	$39.3	$40.0	$64.4	$51.7	$77.1	$79.8	$111.7
Equipment	62.1	39.5	99.7	79.8	44.3	97.6	68.3	91.7	89.2
	85.0	71.2	139.0	119.8	108.7	149.3	145.4	171.5	200.9

In 1977 BN launched a new 5-year plan that contemplates capital expenditures of about $2 billion for expansion and improvements. About half of the total will be for coal-related projects.

The ability of a railroad to satisfactorily provide transportation services and to adequately rehabilitate its plant and equipment can be affected by its corporate structure. Those in a position to control a railroad's actions can divert the carrier's

income, property, and other assets for nonrail purposes. This opportunity exists to a significant degree when a parent holding company controls the railroad.

BN will not be in a position to form a holding company for many years due to bond indenture restrictions. Therefore, the opportunity for a diversion of assets to other sources does not presently exist. Also, the current management of BN appears to be fully dedicated to railroad operations.

EQUIPMENT

Freight car fleet.—Freight cars owned and leased by BN declined from 115,410 in 1970 to 109,245 in 1976, a drop of 5.3 percent. Over the same period, BN's aggregate car capacity rose 3.9 percent, increasing from 7,254,052 to 7,535,319 tons. Accounting for roughly 75 to 80 percent of its total cars and carload capacity during the 7-year period were box, open hopper, and covered hopper cars. Of these three car types, changes in BN's boxcar fleet were most pronounced, dropping from 62,307 to 49,048 cars (-21.3 percent) and from an aggregate capacity of 3,399,773 tons to 2,928,749 tons (-13.9 percent). Open hopper cars, while increasing in capacity from 1,337,505 to 1,392,992 tons, declined slightly in number from 17,666 to 17,279 cars. Both the number and capacity of covered hopper cars increased, rising from 11,655 to 15,045 units and from 1,033,310 to 1,327,991 tons. Other major car types owned and leased by BN in 1976 included: gondola cars (9,543), flatcars (8,366), refrigerator cars (5,384), and stock cars (2,321).

The carrier owns over 80 percent of these cars, down from almost 90 percent in 1970. The average age of its freight cars was 19.5 years at the end of 1976.

Total cars owned and leased by C&S increased from 2,267 units in 1967 to a high of 2,661 in 1972, before dropping to 2,316 in 1976. Total carload capacity followed a similar trend increasing from 155,197 tons in 1967 to a high of 205,139 in 1972, before dropping to 188,190 in 1976. Principal car types showing overall increases between 1967 and 1976 included: boxcars (847 to 908 units), gondola cars (439 to 504 units), open hopper cars (430 to 437 units), covered hopper cars (120 to 316 units), and flatcars (10 to 151 units). Refrigerator cars declined from 421 units in 1967 to 0 in 1976.

FW&D's total cars owned and leased and carload capacity dropped from 1,707 cars in 1967 to 1,249 cars in 1976 and from 98,281 tons to 86,878 tons. While box and covered hopper cars were FW&D's principal car types over the 10-year period, their relative mix changed as boxcars dropped from 1,213 to 696 units and from 60,941 to 35,290 tons in capacity. Covered hoppers, on the other hand, increased from 272 to 464 units and from 26,240 to 45,638 tons in capacity.

Locomotive fleet.—The locomotive fleet has increased by 15 percent since the Northern Lines merger and totaled 2,268 as of December 31, 1976. Over 75 percent are owned by the carrier. The average age of the locomotive fleet is 15.2 years. The carrier is leasing an increasing percentage of its total rolling stock. The locomotive fleet increased to 2,489 units as of December 31, 1978, the largest to date, with 30 percent leased from others.

Maintenance of equipment.—The equipment maintenance ratio declined substantially between 1971 and 1974, from a high of 17.92 percent in 1971 (table D-16). A rising trend occurred in 1975 and 1976. The equipment maintenance expenditures for 1976 were 17.26 percent of operating revenues, which is slightly less than the 17.32 percent for class I railroads as a whole. When the expenditures are restated in 1967 dollars, a decline is evident in each year from 1970 to 1975, with a rise in 1976. The equipment maintenance ratio was 18.57 for 1977, which represented a significant increase in current and constant dollars.

There are two possible reasons for the decline in these expenditures. First, the size of both the locomotive and freight car fleets is decreasing, thus lessening the amount of necessary expenditures. Second, the fleets may not be as well maintained as they should be. Tables D-17 and D-18 show BN's revenue freight cars in unserviceable condition and locomotive bad orders, respectively. Bad orders for both freight cars and locomotives are high, which would indicate an inadequate amount of maintenance expenditures.

BN is proposing multimillion dollar improvements in inspection/repair facilities at both Alliance and Mandan, to go with the preventive maintenance coal car shop recently completed at Laurel, MT, and the new automated system wheel shop at Havelock. Heavy repair and component-rebuild work on locomotives will continue to be concentrated at Livingston, MT, and West Burlington, IA.

Freight car performance.—Freight car performance is measured by the selected data showing car utilization in table D-21. This schedule reveals that:

Car-miles per serviceable car-day have fluctuated greatly from year to year, with a high of 72.1 miles per day in 1976;

A steady increase is evident in net ton-miles per serviceable car-day in all years except 1975, with an increase of 45.5 percent between 1970 and 1976; and

The hours per day in freight train service improved slightly.

BN's freight car performance compares favorably with other class I railroads and the western district roads. All three measures increased significantly for 1978.

Locomotive performance.—Table D-22 presents selected indicators of locomotive performance. While all the indicators have fluctuated on a yearly basis, they all show an increase in 1976 over 1970. A comparison of 1976 with 1975 shows a significant increase for both locomotive-miles per day and miles per year per locomotive, and a decrease in gross ton-miles per locomotive-mile and in the number of active locomotives in road service. The 1978 performance is better than western district and class I averages.

Table D-23 shows additional efficiency indicators. Transportation gross ton-miles per man-hour of employment is an important indicator in measuring productivity trends of railroad labor. This element has steadily risen between 1970 and 1976. BN's performance for 1976 for better than the average for all class I roads yet worse than the average for western roads.

A gradual improvement is evident in the transportation ratio (ratio of transportation expense to operating revenues). This improvement is probably attributable to increased benefits from rising traffic levels, increased average haul and possibly from benefits from the carrier's maintenance program. BN's transportation ratio for 1976 (39.0) was somewhat better than the 38.6 for total class I roads and slightly worse than 39.6 for western roads.

The operating ratio for 1976 unfavorably rose from the 1974 and 1975 levels, but improved between 1970 and 1975. BN's operating ratio of 81.4 percent for 1976 was worse than the 78.4 percent for western district railroads and the 80.5 percent for total class I railroads. However, it still represents an improvement from the 84.4 percent reported by BN for 1970.

MAINTENANCE SUMMARY

BN has adequately maintained its system in the recent past, especially its major corridors. There could be some deficiencies which resulted from prior years'

maintenance programs influencing bad orders, slow orders, and tie and rail replacement rates. Revenue freight cars in unserviceable condition compared to total ownership indicates that BN has a higher bad order ratio than both the western district average and total class I average for 1977. However, as of December 31, 1978, the percentage of cars in unserviceable condition decreased significantly, to slightly more than 5 percent from over 9 percent the previous year. Slow orders, which are a good indication of track and roadbed conditions, have increased from 1976 to 1977, yet the total miles affected by these slow orders has decreased. As of December 31, 1977, BN had approximately 6.7 percent of its trackage under slow order. BN reported a decrease in slow orders as of December 31, 1978 with less than 4 percent of miles operated affected.

Tie replacement for 1976 was 2.94 percent of total ties. This was the first year during the 7-year period 1970-76 that tie replacement was better than our benchmark of 2.5 percent. However, BN tie replacement has continued to improve, with the carrier reporting replacements of 3.02 and 3.07 percent for 1977 and 1978 respectively.

While average rail replacement for the 7 years 1970-76 for BN was 2.5 percent of the average miles operated, the average replacement for the 4-year period from 1970-73 was a low 1.8 percent. With the anticipated significant increase in coal traffic, our benchmark of 2.0 percent replacement for rail and 2.5 percent for ties could be too low. It should be noted that BN rail replacements have increased and registered over 3 percent for both 1977 and 1978.

The performance and efficiency indicators review show that BN is as good or better than the averages for western district and total class I carriers in most categories.

BN has been preparing for the anticipated increase in coal traffic by allocating the largest part of roadway expenditures to the four major rail corridors. Originating coal traffic is expected to increase to over 125 million tons by 1981 from 18.7 million tons in 1970. Coal traffic, particularly unit trains, tends to place more stress on the rails, roadbed and equipment than does merchandise or other commodity traffic, thereby necessitating increased maintenance expenditures.

Maintenance-of-way and maintenance-of-equipment ratios rose to 19.65 percent and 18.57 percent for 1977 respectively. These ratios represent increases of over 1 percent in each category from the prior year and substantial amounts over class I ratios. Also, expenditures for additions and betterments for road and equipment totaled $171.5 million for 1977 and $200.9 million for 1978.

We expect BN's concentration on upgrading its system to continue and adequate service to be rendered to the public.

SAFETY

BN reported 783 accidents for 1976, second only to ConRail. Derailments accounted for 580 of the accidents. Track defects were related to 46 percent (269) of derailments, while 29 percent (168) of derailments were related to equipment defects. BN incurred monetary damages of $19.4 million.

Although the number of reported accidents appears to be high, this carrier operates the largest system in the United States, with over 22,000 miles of track. ConRail is the second largest system. Also, when reviewed on an accident per train-mile basis, BN ranks favorably with the rest of the industry. BN's reported 12.5 accidents per million train-miles for 1976. This represents a better record than the 14.2 and 12.9 accidents per million train-miles reported by the western district and the total class I railroads (line-haul), respectively.

FINANCIAL INFORMATION

On June 30, 1974, BN reported deferred maintenance—road of $45.7 million, deferred maintenance—equipment of $18.2 million, delayed capital improvements—road of $244.3 million, and delayed capital improvements—equipment of $160.3 million. As of December 31, 1978, it reported declines in all of these accounts with reported amounts of deferred maintenance—road of $14.6 million, deferred maintenance—equipment of $0.7 million, delayed capital improvements—road of $227.8 million, and delayed capital improvements—equipment of $129.7 million.

Total railway operating revenues increased yearly, from $800 million in 1968 to $2 billion in 1978. During the 10-year period 1968-77 costs were controlled rather well, with an almost constant operating ratio of 82 percent. The average net railway operating income since 1968 was $56.7 million. BN reported net incomes in all those years, with the exception of 1971 due to an extraordinary item of $67.5 million. While net railway operating income has been substantial, other income has been greater than $50 million annually since 1973.

The carrier has had positive working capital each year during the period under study. The working capital ratio ranged from a high of 1.68 to a low of 1.15. In 4 of the 11 years, BN did not have sufficient working capital to meet the monthly average working capital requirement. However, the average yearly working capital for the 11 years was greater than the average of the monthly average working capital requirement.

After the *Northern Lines Merger* the net investment remained stable for several years, then began to gradually rise. The rate of return average 2.24 percent for the period 1968-78, reflecting a low of 1.67 percent in 1970 and a high of 2.92 percent in 1978.

Net income, with no consideration of noncash items, was sufficient to cover long-term debt due within 1 year for only 5 of the past 11 years. Long-term debt due after 1 year increased annually from 1971-77, with exception of a slight decline in 1976.

The debt-equity ratio remained relatively stable from 1970 to 1975. The ratio declined slightly in the following 2 years. If the 1978 ratio is adjusted for comparability with prior years, it would be 33.5.

Fixed charges have steadily increased since 1970 and have averaged $51.5 million per year. Income available for fixed charges has been more than sufficient in each year. Fixed charges coverage ratio averaged 2.14 for the period 1970 to 1978 and was 2.52 for 1978.

Net rents have increased in each year since 1968, with the exception of 1977. The decrease in 1977 is explained by the effect of least capitalizations as required by FASB No. 13.

BN's total fleet decreased by 15.64 percent from 1971-78, while its aggregate capacity decreased by 1.97 percent.

TABLE B-8

Income (Loss, Dividends, 1968-78

	1978[1]	1977	1976	1975	1974	1973	1972	1971	1970	1969[2]	1968
					Thousands						
Total railway operating revenues	$1,976,488	$1,677,857	$1,536,777	$1,320,868	$1,290,829	$1,093,603	$1,000,517	$890,182	$877,[illegible]	$844,[illegible]	$800,737
Total railway operating expenses	1,899,194	1,396,416	1,251,434	1,068,668	1,026,656	903,803	827,621	770,536	760,810	700,875	654,083
Net railway operating income	86,880	61,544	63,838	54,823	71,830	43,482	48,208	48,714	38,740	48,998	56,875
Income available for fixed charges	172,321	135,728	126,381	108,310	133,684	85,781	86,009	71,360	72,334	95,342	99,806
Fixed charges	68,336	60,817	55,783	55,619	51,133	47,135	45,048	40,435	38,257	36,098	36,541
Total extraordinary items and accounting changes	-0-	-0-	-0-	-0-	-0-	-0-	-0-	(67,475)	-0-	(33,215)	298
Net income	113,550	74,902	72,588	57,041	82,560	38,656	40,961	(36,541)	33,875	25,985	63,441
Dividends appropriated	29,152	24,649	18,049	12,750	21,547	15,265	20,300	20,587	27,554	40,806	46,863
Provision for deferred taxes	(1,888)	1,351	2,847	7,082	1,190	---------	---------	--------	--------	---------	--------
Undistributed earnings	22,706	15,923	7,671	2,872	6,201	---------	---------	--------	--------	---------	--------
Restated net income[3]	89,464	60,235	67,814	54,851	77,548	---------	---------	--------	--------	---------	--------

[1]As of January 1, 1978, the Uniform System of Accounts was revised. Railway operating expense for 1978 is not comparable to prior years.

[2]Data for preceding 1969 and 1968 includes results of NP, GN, CB&Q and SPSL.

[3]Net income was restated for comparative purposes by excluding provisions for deferred taxes and undistributed earnings from affiliated companies.

TABLE B-9

Working capital, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total current assets	$536,716	$400,777	$360,482	$300,856	$382,812	$305,398	$264,737	$239,789	$267,363	$250,188	$281,350
Total current liabilities	465,325	329,193	302,857	247,711	240,822	217,258	183,825	196,278	193,712	173,838	187,098
Working capital	71,930	171,584	66,625	103,145	141,990	88,040	71,212	43,511	73,651	85,331	113,452
Total operating expenses	1,899,194	1,396,[illegible]	1,251,434	1,068,668	1,026,656	903,803	827,621	770,536	760,810	700,875	654,083
Property depreciation	19,050	18,874	18,879	18,030	18,029	16,162	15,617	14,460	14,460	14,092	13,854
Equipment depreciation	63,582	57,081	49,050	47,534	45,682	44,710	45,013	46,729	47,584	46,579	46,343
Net rents	(2)	(55,256)	(60,748)	(54,944)	(43,487)	(36,706)	(38,043)	(32,583)	(16,432)	(15,043)	(10,168)
Payroll and other railway taxes excluding income taxes	(3)	171,719	152,798	132,989	132,382	106,887	87,875	82,025	82,396	77,253	74,534
Operating expenses less depreciation plus net rents and taxes	1,816,662	1,345,518	1,207,241	1,105,957	1,140,711	985,634	903,109	832,967	776,794	732,400	670,368
Monthly average working capital requirement	151,370	120,626	116,437	99,163	99,018	82,219	74,926	69,614	64,732	61,117	56,332
Working capital ratio	1.15	1.58	1.29	1.58	1.99	1.40	1.39	1.22	1.38	1.49	1.68

[1]Equipment obligation and other long-term debt due within 1 year are included in total current liabilities for 1978. Prior to 1978 they were not included.

[2]Net rents are included in operating expenses for 1978.

[3]Taxes are included in operating expenses for 1978.

TABLE D-10

BE--rate of return on net investment in transportation property 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Investment in transportation property	$3,938,481	$3,756,217	$3,572,812	$3,474,369	$3,368,974	$3,320,874	$3,265,632	$3,246,842	$3,273,441	$3,251,097	$3,310,373
Cash	3,782	20,418	13,509	29,115	11,294	(1,425)	(5,289)	16,999	7,995	2,314	9,035
Material and supplies	211,829	208,169	178,196	160,726	126,018	96,948	76,720	78,465	73,772	54,530	53,786
Depreciation and amortization	1,183,264	1,167,318	1,117,142	1,068,711	1,031,493	1,016,336	1,007,627	1,044,204	1,034,015	1,010,644	878,616
Net investment	2,970,828	2,817,486	2,647,375	2,595,499	2,473,793	2,400,061	2,329,436	2,298,102	2,321,193	2,297,297	2,484,578
Net railway operating income	86,880	61,544	63,638	54,823	71,830	43,482	48,200	48,714	38,748	46,999	58,875
Net railway operating income as a percent of net investment	2.92	2.18	2.40	2.11	2.90	1.81	2.07	2.12	1.67	2.05	2.36

TABLE D-11

BE--debt structure, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Long-term debt due within 1 year	61,429	72,719	50,911	59,734	43,177	43,972	56,913	48,206	48,749	44,275	43,898
Long-term debt due after 1 year	[1]1,303,529	929,260	919,558	924,907	903,677	897,459	861,309	830,084	867,740	815,173	840,819
Total stockholders' equity	1,959,616	1,876,233	1,732,937	1,668,388	1,629,629	1,641,390	1,617,999	1,591,975	1,734,088	1,945,746	2,139,607
Debt-equity ratio--percent	39.9	33.1	34.7	35.7	35.7	35.3	34.7	34.3	33.4	29.5	28.2

[1]Long-term debt due after 1 year for 1978 is not comparable to prior years.

TABLE D-12

BN average miles of road operated, number of locomotives and freight cars owned and leased, and freight car capacity, 1970-78

	Average mileage of road operated	Locomotives		Freight cars		Aggregate capacity of freight cars	Tons of revenue freight
		Owned and used	Leased from others	Owned and used	Leased from others		
						Tons	*Thousands*
1978	22,729	1,738	751	82,373	14,882	7,160,470	174,625
1977	22,457	1,699	661	87,751	17,865	7,556,280	151,091
1976	22,412	1,703	565	90,048	19,197	7,535,319	149,006
1975	22,614	1,703	490	93,726	19,770	7,748,235	137,503
1974	22,772	1,710	466	91,203	17,588	7,327,172	146,846
1973	22,855	1,726	382	93,518	18,375	7,413,942	146,739
1972	23,129	1,694	341	95,045	16,642	7,293,827	136,104
1971	23,289	1,747	319	98,323	15,666	7,304,374	131,128
1970	23,261	1,748	225	102,393	13,017	7,254,052	134,151

Source: Form R1.

TABLE D-13

BN tonnage—originating and received from connection

	Originating on road	Percent of total tonnage	Received from connection	Percent of total tonnage	Total tonnage
1978	145,059,138	83	29,566,073	17	175,625,211
1977	121,697,894	81	29,230,323	19	150,928,217
1976	118,888,543	80	29,897,978	20	148,786,521
1975	108,775,333	79	28,401,292	21	137,176,625
1974	113,328,296	77	33,258,224	23	146,444,035
1973	114,203,643	78	32,240,392	22	146,444,035
1972	106,159,532	78	29,918,394	22	136,077,926
1971	97,581,255	76	31,260,947	24	128,842,202
1970	99,142,122	75	32,694,023	25	131,836,145

Source: Moody's.

TABLE D-14

BN maintenance of way and structures, 1970-77

	Actual dollars	Per equated track mile	Percent of operating revenues	Expenditures in 1967 dollars	Per equated track-mile in 1967 dollars
	Thousands			*Thousands*	
1977	329,650	12,096	19.65	135,491	4,972
1976	283,294	10,296	18.43	125,351	4,556
1975	225,207	8,143	17.05	110,341	3,990
1974	207,584	7,484	16.08	114,941	4,144
1973	177,957	6,376	16.27	107,787	3,862
1972	158,831	5,630	15.54	107,901	3,824
1971	146,081	5,144	15.54	107,650	3,791
1970	127,430	4,495	14.61	103,940	3,651

Sources: Moody's calculation with AAR—series QMPW.

TABLE D-15

BN crossties, rail replacement and new rail laid, 1970-78

	Crossties replaced	Crossties replaced per equated track-mile	Percent of crossties replaced to total ties	Rail replacement—miles of track	New rail laid—miles of track	New rail laid pounds per yard average section
1978	2,774,578	101	3.07	1,053	413	131
1977	2,716,642	100	3.02	1,095	388	130
1976	2,674,049	97	2.94	893	255	129
1975	2,211,740	80	2.41	772	255	129
1974	1,928,147	70	2.10	655	239	128
1973	1,549,364	56	1.67	472	265	123
1972	1,416,115	50	1.52	354	178	122
1971	1,265,135	45	1.34	472	154	121
1970	1,196,692	42	1.27	351	180	127

Source: Moody's.

TABLE D-16

BN maintenance of equipment

	Actual dollars	Percent of operating revenue	1967 dollars
	Thousands		
1977	311,564	18.57	128,058
1976	265,195	17.26	117,343
1975	217,565	16.47	106,597
1974	199,296	15.44	110,352
1973	182,863	16.72	110,759
1972	176,344	17.63	119,799
1971	168,452	17.92	124,136
1970	154,273	17.73	125,834

Sources: Moody's: calculation with AAR—series QMPW.

TABLE D-17

BN revenue freight cars in unserviceable condition

Month	Cars undergoing or awaiting repairs		Total	Total cars owned	Percent to owned	Average western district
	Heavy	Light				
1977						
January	7,498	3,256	10,754	110,660	9.7	7.6
February	7,781	3,836	11,649	110,282	10.6	7.7
March	8,076	3,803	11,879	110,347	10.8	7.8
April	8,333	3,328	11,661	110,551	10.5	7.7
May	8,227	3,810	12,037	109,688	11.0	7.6
June	7,073	3,783	10,856	109,506	9.9	7.6
July	5,613	3,650	9,263	109,665	8.4	7.2
August	5,914	4,189	10,103	108,800	9.3	7.4
September	5,769	4,569	10,338	108,404	9.5	7.3
October	5,503	4,196	9,699	107,279	9.0	7.3
November	5,618	4,462	10,080	106,934	9.4	7.4
December	6,205	3,938	10,143	107,037	9.5	7.5
Monthly average					9.8	7.5

Source: AAR report No. 7712.

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TABLE D-18

BN locomotive bad orders

	Total owned or leased	Number of units unserviceable	Percent to owned
June 30, 1974	2,042	104	5.1
September 30, 1974	2,062	128	6.2
December 31, 1974	2,125	124	5.8
March 31, 1975	2,123	129	6.1
June 30, 1975	2,139	151	7.1
September 30, 1975	2,146	181	8.4
December 31, 1975	2,149	192	8.9
March 31, 1976	2,184	174	8.0
June 30, 1976	2,171	157	7.2
September 30, 1976	2,171	159	7.3
December 31, 1976	2,200	173	9.9
June 30, 1977	2,239	156	7.0
December 31, 1977	2,299	205	8.9
December 31, 1978	2,476	212	8.6

Source: Ex Parte No. 305 filings.

TABLE D-19

BN average train performance: selected data, 1970-78

Year	Net tons per train[1]	Freight cars per train[2]	Number of loaded freight cars per train[3]	Tons per loaded car[4]	Average speed (m.p.h.)[5]
1970	1,596	69.0	38.0	42.0	22.2
1971	1,663	64.9	34.9	47.7	22.2
1972	1,822	65.3	35.5	51.3	23.0
1973	1,985	66.5	37.0	53.5	22.4
1974	2,000	66.3	36.6	54.7	19.4
1975	2,258	73.2	40.5	58.2	21.0
1976	2,283	71.3	38.3	59.7	22.8
1977	2,447	71.2	39.3	62.4	22.7
1978	2,406	72.3	40.3	68.0	21.7

[1]Net ton-miles per train-mile (computed).
[2]Freight car-miles per freight train-mile.
[3]Cars per train x proportion of freight car-miles loaded (computed).
[4]Net ton-miles per loaded car-mile.
[5]Train-miles per train-hour.
Source: "Operating and Traffic Statistics," AAR.

TABLE D-20

BN gross and net ton-miles per freight train-hour, 1970-78

Year	Gross ton-miles per freight train-hour[1]	Net ton-miles per freight train-hour[2]
	Thousands	
1970	78.8	35.4
1971	77.9	37.0
1972	84.8	41.9
1973	87.5	44.5
1974	77.8	38.8
1975	96.0	47.3
1976	103.8	52.0
1977	107.4	55.5
1978	106.3	52.2

[1]Does not include locomotives.
[2]Contents of cars.
Source: "Operating and Traffic Statistics," AAR.

TABLE D-21

BN average freight car performance: selected data, 1970-78

Year	Car-miles per serviceable car-day	Net ton-miles per service-able car-day	Hours per day in freight train service
1970	68.7	1,587	3.09
1971	62.1	1,591	2.80
1972	64.7	1,803	2.81
1973	71.2	2,125	3.18
1974	71.9	2,168	3.71
1975	66.5	2,050	3.17
1976	72.1	2,309	3.16
1977	77.6	2,668	3.42
1978	90.3	3,005	4.16

Source: "Operating and Traffic Statistics," AAR.

TABLE D-22

BN average locomotive performance in freight service: selected data. 1970-78

Year	Gross ton-miles per locomotive-mile	Locomotive-miles per day	Number of active locomotives	Miles per year per active locomotive
				Thousands
1970	1,301	197	1,312	71.9
1971	1,259	201	1,385	73.5
1972	1,253	218	1,468	79.2
1973	1,430	204	1,492	74.3
1974	1,417	213	1,542	77.6
1975	1,507	192	1,571	70.2
1976	1,478	233	1,502	82.8
1977	1,555	232	1,560	82.5
1978	1,646	224	1,713	79.7

Source: "Operating and Traffic Statistics," AAR.

TABLE D-23

BN efficiency factors

Year	Transportation gross ton-miles per man-hour of employment	Transportation expense to operating revenue	Operating ratio (railway operating expenses ÷ railway operating revenues)
1978	N/A	N/A	96.09
1977	N/A	38.5	83.23
1976	1,932.2	39.0	81.43
1975	1,834.9	40.0	80.75
1974	1,753.4	40.7	79.53
1973	1,635.7	41.5	82.64
1972	1,522.1	40.7	82.72
1971	1,355.4	40.6	82.81
1970	N/A	41.9	84.37

Source: Moody's; Standard & Poor's.

APPENDIX E

Summary of Frisco traffic, facilities, equipment, safety, and financial data

TRAFFIC

Frisco's freight traffic for the years 1967 to 1976 consisted of approximately 15- to 17-percent local traffic, 29- to 33-percent interline originated, 26- to 28-percent interline terminated and 24- to 29-percent overhead traffic. Frisco's average length of haul remained relatively constant, rising from 354 miles in 1967 to 362 miles in 1976, with high and low points of 389 miles (1973) and 344 miles (1970). Total carloads hauled increased from 772,860 in 1967 to a high of 871,958 in 1973 before dropping to 767,881 in 1976. Revenue-tons and revenue ton-miles showed nearly equal increases over the 10-year period, with the former increasing 23.2 percent (32.7 to 40.3 million tons) and the latter increasing 25.9 percent (11.6 to 14.6 billion ton-miles). Freight revenue, totaling $307.3 million in 1976, registered a 108.2 percent increase during the period.

Food and kindred products consistently remained Frisco's principal commodity, accounting for 15.8 percent of its 1976 freight revenue and revenue tonnage. Of next importance in each year, were chemicals and allied products, transportation equipment and farm products, which together accounted for 31.7 and 25.8 percent of Frisco's 1976 freight revenue and tonnage, respectively. Other major commodities moved in 1976 included: pulp, paper and allied products (8.6 percent of revenue and 6.7 percent of tonnage); stone, clay and glass products (6.1 percent of revenues and 7.1 percent of tonnage); lumber and wood products (5.9 percent of revenue and 8.0 percent of tonnage); coal (4.5 percent of revenue and 13.4 percent of tonnage); petroleum and coal products (4.1 percent of revenue and 4.0 percent of tonnage) and nonmetallic minerals (3.8 percent of revenue and 6.3 percent of tonnage).

Principal commodities moved by ATN, which was merged into Frisco in 1971, were metallic ores; food and kindred products; lumber and wood products; pulp, paper and allied products; and primary metal products. In its last year of operation as a corporate entity, ATN's revenue tonnage, revenue ton-miles, and freight revenue totaled $3.3 million, $476.9 million, and $5.9 million, respectively. ATN's 1970 traffic consisted largely of interline originated movements (47.7 percent of total carloads), followed by interline terminated (27.2 percent), overhead (13.0 percent), and local movements (12.1 percent).

QAP's freight traffic dropped sharply between 1967 and 1976, as shown in table E-1.

TABLE E-1

Freight traffic statistics, QAP

Year	Carloads	Revenue tons	Revenue ton-miles	Freight revenue
			Thousands	
1967	45,282	1,242,920	129,956	$3,257,343
1976	5,556	272,995	4,146	783,592

Principal revenue producing commodities also underwent substantial change as the top three commodities of 1967—freight forwarder traffic (26.6 percent of revenue), transportation equipment (19.1 percent), and chemicals and allied products (10.6 percent)—changed to farm products (35.8 percent), food and kindred products (28.5 percent), and chemicals and allied products (12.2 percent) in 1976.

QAP's 1967-76 traffic consisted of predominantly overhead traffic, accounting for 61.9 percent of its 1976 carloads, followed by interline originated (27.4 percent), local (6.1 percent), and interline terminated traffic (4.6 percent). Chart D in appendix O shows Frisco's main routes and their respective traffic densities in schematic form. Traffic desnsities over Frisco's Kansas City-Birmingham main line in 1976 ranged from 16 to 25 million gross ton-miles (GTM) per mile of road. The major gateways on this line are Kansas City, Memphis, and Birmingham.

Frisco interchanged nearly 180,000 cars at Kansas City in 1976 (see table E-2). Of these cars, about 84,000 or 47 percent moved over Frisco lines as overhead (bridge) traffic, and UP handled over half of these movements in connection with Frisco. UP was by far the largest-volume connection for Frisco, accounting for over 77,000 of the 180,000 cars interchanged by Frisco. BN and ATSF interchanged the next largest amounts with Frisco (28,000 and 27,000 cars, respectively).

TABLE E-2

Frisco Kansas City (Missouri and Kansas) interchange

Connecting carrier	Originated	Terminated	Overhead	Total
		Carloads		
ATSF	11,732	4,642	10,378	26,752
BN	5,780	11,976	10,452	28,208
CNW	2,877	5,854	6,661	15,402
ICG	247	650	173	1,070
KCS	121	69	94	284
MILW	4,427	4,784	3,579	12,790
MKT	56	32	18	106
N&W	515	760	1,475	2,750
RI	2,452	2,678	3,459	8,589
MP	2,372	2,989	1,005	6,366
UP	15,413	14,762	47,086	77,261
Total	46,002	49,196	84,380	179,578

The following table shows the major regional distributions of the cars interchanged at Kansas City. Movements of less than 100 cars per connecting carrier between State pairs were excluded. These exclusions do not materially affect the data.

TABLE E-3

Frisco carloads interchanged at Kansas City: major traffic flows between regions

Movements between	Carloads[1]
South Central and:	
South-Central	19,485
Northeast	5,867
Southwest	8,946
Northwest	10,840
North-Central	23,176
South-Southeast and:	
North-Central	8,261
Northwest	18,504
Southwest	14,148
South-Central	4,961
North-Southeast and:	
Southwest	12,145
Northwest	11,038

[1]Due to the exclusion of movements of less than 100 cars, the carload figures constitute minimum numbers.

ATSF accounted for almost two-thirds of Frisco's Kansas City interchange traffic moving wholly within the South-Central States. UP's interchange represented 80 to 90 percent of the traffic moving between the following pairs of regions: South-Central and Southwest; North-Southeast and both the Northwest and the Southwest; and the South-Southeast and both the Northwest and the Southwest. UP also was the dominant Frisco connection for traffic moving between the South-Central and the Northwest regions, accounting for over 60 percent of such traffic. For traffic moving between South-Central and North-Central points, the major connections were BN (33 percent), CNW (29 percent), and Milwaukee Road (19 percent). The remainder of Frisco's traffic interchanged at Kansas City was rather widely dispersed.

Frisco originated 19,402 carloads at the Kansas City gateway (of which nearly two-thirds was local to the Frisco), and terminated 25,506 carloads (more than 70 percent local to the Frisco).

Springfield, MO, the intersection of the Kansas City-Birmingham and the St. Louis-Fort Worth main lines, was the origin for about 12,000 carloads and the termination for about 23,000 carloads in 1976.

Frisco interchanged 111,754 carloads at Memphis, of which 46,329 were movements between Frisco and Southern. Almost two-thirds of Frisco's Memphis interchange traffic moved as bridge traffic over Frisco. Frisco's role as a bridge carrier to each of its Memphis connections is demonstrated in the table below.

TABLE E-4

Frisco Memphis interchange

Connecting carrier	Originated	Terminated	Overhead	Total
		Carloads		
RI	650	1,579	4,088	6,317
ICG	4,991	5,009	5,807	15,804
L&N	3,149	3,940	8,647	15,736
MP	999	2,972	14,495	18,466
SSW	524	2,663	5,912	9,099
SOU	3,862	9,490	32,977	46,329
Total	14,175	25,653	71,926	111,754

Of the 111,754 carloads interchanged at Memphis, over 37,000 moved between the South-Southeast and the South-Central regions. Other major traffic flows through Memphis were movements between: the Southwest and the North-Southeast (over 14,000 carloads); and the Southwest and the South-Central and the North-Southeast (approximately 14,000 carloads).

At Memphis, Frisco originated 43,471 carloads, of which 37,719 were forwarded by it, while it terminated 40,088 carloads with 30,526 of these carloads, received by it.

Approximately 57 percent of Frisco's traffic interchange at Birmingham was handled as bridge movements over Frisco. The Birmingham interchange amounted to 172,809 carloads in 1976, of which almost three-fourths were interchanged with SCL. Nearly 50,000 of the carloads interchanged at Birmingham moved between the South-Central and South-Southeast regions. Approximately 32,000 carloads moved between the South-Southeast on the one hand, and the Northwest and the Southwest on the other hand.

TABLE E-5

Frisco Birmingham interchange

Connecting carrier	Originated	Terminated	Overhead	Total
		Carloads		
BS	124	1,280	2,483	3,887
ICG	86	140	49	275
L&N	5,709	2,541	4,472	12,722
SCL	28,157	17,537	82,415	128,109
SOU	16,079	2,943	8,794	27,816
Total	50,155	24,441	98,213	172,809

In 1976, Frisco originated 5,832 carloads at Birmingham, of which 3,230 moved as total traffic over Frisco lines.

From Memphis, Frisco extends north to St. Louis via Cape Girardeau. Traffic densities over this route totaled 8 to 9 million GTM per mile of road. At Cape Girardeau, Frisco interchanged 15,154 carloads with MP, of which 15,145 terminated on Frisco. In 1976, 7,749 carloads of Frisco traffic originated at Cape Girardeau. Rush Tower, MO, north of Cape Girardeau, was the termination point for over 15,000 carloads in 1976.

From its Kansas City-Birmingham main line at Amory, Frisco extends south to Mobile and Pensacola. Along these segments traffic densities totaled 5 million GTM per mile of road or less. Pensacola was the termination point for over 8,000 carloads in 1976. Connecting with its Amory-Pensacola segment at Aliceville is Frisco's Mobile-Aliceville line. Major gateways along this line include Mobile and Cromwell. At Mobile, Frisco interchanged 6,000 carloads with L&N, 515 with SOU, and 199 with ICG. Of the carloads interchanged with L&N, 4,468 originated on Frisco, 104 terminated on Frisco, and 1,428 were overhead traffic. Mobile also was a major Frisco origin and destination point in 1976, accounting for the origination of 7,226 carloads and the termination of 13,273 carloads. At Cromwell, Frisco interchanged 6,425 carloads with MBRR, of which 3,110 originated on Frisco, 998 terminated on Frisco, and 2,317 were Frisco overhead traffic.

Traffic densities over Frisco's St. Louis-Fort Worth main line range from 11 to 24 million GTM per mile of road.

Frisco's 1976 interchanges through the St. Louis gateway are shown below.

TABLE E-6

Frisco St. Louis interchange

Connecting carrier	Originated	Terminated	Overhead	Total
		Carloads		
BO	5,485	3,973	2,277	11,735
BN	2,291	5,857	3,349	11,497
CNW	2,578	4,223	4,240	11,041
CRIP	34	133	340	507
CR/PCR	18,325	16,733	6,224	41,282
ICG	2,668	9,677	1,550	13,895
ITC	1,290	883	491	2,644
L&N	1,306	2,001	509	3,816
MKT	28	26	220	274
MP	3,679	3,596	2,195	9,470
N&W	6,493	12,735	5,263	24,491
SSW	6	35	61	102
SOU	823	868	1,091	2,782
Total	45,006	60,740	27,810	133,556

Of the 133,556 carloads interchanged by Frisco at St. Louis, over 90,000 had origins or destinations in the Northeast. Slightly over 64,000 moved between the Northeast and the South-Central States, while another 25,000 moved between points in the

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Northeast and points in the Southeast. The remaining Frisco traffic interchanged through St. Louis in 1976 was quite widely dispersed.

St. Louis was the origin point for 12,990 carloads of Frisco traffic (7,867 of which were local to Frisco) and the termination point for 8,913 carloads (including 5,555 local movements).

At Tulsa Frisco interchanged 8,129 carloads in 1976, of which 5,641 were interchanged with small local carriers. Frisco and MKT interchanged 2,029 carloads, while MP and the Santa Fe each interchanged only about 200 carloads with Frisco. As an origin point, Tulsa accounted for 13,466 carloads of Frisco traffic. Terminations at Tulsa totaled 12,130 carloads. The bulk of the originated and terminated traffic was of interlined.

Frisco interchanged 19,030 carloads at the Sherman, TX, gateway, primarily with SP (16,608 carloads). About half of the SP-Frisco interchange volume involved traffic moving wholly within the South-Central States. The balance of the total interchange was divided between SSW (1,929), MP (425), and MKT (68).

Table E-7 shows the combined Frisco interchanges which took place in 1976 at Dallas, Fort Worth, and Irving, TX.

TABLE E-7

Frisco interchanges at Dallas, Fort Worth and Irving

Connecting carrier	Originated	Terminated	Overhead	Total
		Carloads		
ATSF	1,304	1,533	2,580	5,617
RI	1,068	100	263	1,431
FW&D	5,155	635	8,068	13,858
L&A	3,712	348	164	4,224
MKT	1,663	331	632	2,626
MP	5,997	2,840	3,009	11,846
SSW	191	79	111	381
SP	1,613	997	534	3,144
Total	20,903	6,863	15,361	43,127

Approximately 21,000 of the 43,107 Frisco carloads interchanged in the Dallas-Fort Worth-Irving area moved between points in Texas and other points in the South-Central region. The bulk of the remaining traffic also had origins or destinations in Texas (including over 2,000 carloads which moved wholly within Texas). Frisco's principal interline connections at the gateways are FW&D and MP. Of the 13,858 carloads interchanged with FW&D, 8,068 moved as bridge traffic over Frisco.

Dallas, Fort Worth, and Irving are major termination points for Frisco. In 1976, nearly 33,000 carloads terminated at these locations. The points were not, however, among Frisco's major traffic originating stations.

From its St. Louis-Fort Worth main line at Monett, MO, Frisco extends south through Fort Smith, MO to Paris, TX. Another line extends from Pierce City, MO (near Monett) west through Wichita, KS, to Ellsworth, KS. Traffic densities on these lines totaled less than 3 million GTM per mile in 1976. On the Pierce City-Wichita segment, at Cherryvale, KS, Frisco interchanged 6,233 carloads with Santa Fe. Of

these, 882 originated on Frisco, 2,893 terminated on Frisco, and 2,458 were Frisco overhead traffic.

From its St. Louis-Fort Worth main line at Afton, OK, Frisco extends north to Fort Scott, where connection is made with the Kansas City-Birmingham main line. Traffic densities between Afton and Fort Scott totaled 10 million GTM per mile of road.

From Tulsa, one Frisco line extends west to Avard, OK, and another extends southwest to Quanah. Traffic densities between Tulsa and Avard totaled 5 to 7 million GTM per mile of road. At Avard, Frisco interchanged 53,056 carloads with ATSF (the only connecting carrier), of which 19,369 originated on Frisco, 4,405 terminated on its lines, and 29,282 were Frisco overhead traffic. The principal traffic flows through Avard involved movements between the North-Southeast and the Southwest (20,148 carloads) and between the South-Southeast and the Southwest (15,247 carloads).

In 1973, Frisco completed a major upgrade of its line between Tulsa and Avard to provide an improved transcontinental route in connection with Santa Fe. In the past, Frisco relied on a more circuitous route via a QAP interchange with ATSF at Floydada, TX. Frisco expects to abandon nearly all of the QAP. In 1976, Frisco traffic density from Tulsa to Oklahoma City totaled 4 million GTM per mile, and from Oklahoma City to Quanah (the point of connection with QAP), less than 1 million GTM per mile. Oklahoma City was the termination point for nearly 15,000 carloads in 1976.

On QAP, the major interchanges were at Quanah, where 4,287 carloads were interchanged with FW&D; State Line, TX, where 4,278 carloads were interchanged with Frisco; and Floydada, where 304 carloads were interchanged with ATSF.

Crossing its St. Louis-Fort Worth main line at Lake Side, OK is Frisco's line from Ardmore, OK to Hope, AR. Densities over this line totaled about 3.0 million GTM per mile of road. Major gateways along this route are located at Valliant, OK and at Hope and Ashdown.

TABLE E-8

Frisco interchanges at Valliant, Ashdown, and Hope

Gateway	Connecting carrier	Originated	Terminated	Overhead	Total
Valliant	TOE	1,157	1,027	15,492	17,676
Ashdown	Total	1,157	1,027	15,492	17,676
	GNA	512	1	29	542
	KCS	6,465	468	3,372	10,305
Hope	Total	6,977	469	3,401	10,847
	L&A (KCS)	2,461	310	160	2,931
	MP	1,063	423	4,533	6,019
	Total	3,524	733	4,693	8,950

Nearly all of the carloads interchanged with KCS, L&A, and MP involved movements wholly within the South-Central States.

Frisco has several other major traffic producing points. Catale, Chelsea, Enid, Mill Creek, and Southard, OK each generated 5,000 and 13,000 carloads in 1976. In Missouri, Valley Park was the origin point for nearly 17,000 carloads, and about 8,000

carloads originated at Buick, Betner, TX, Foreman and Fort Smith, AR, MacMillan, AL, and Garland, KS, each generated 5,000 to 10,000 carloads. At Springdale, AR about 8,000 carloads were terminated in 1976.

Table E-9 indicates Frisco's run-through train operations.

TABLE E-9

Frisco run-through train operations

	Origin-destination	Route and junction	Market territory
	Each direction		
X	Memphis, TN-Hamlet, NC	SLSF-Birmingham, AL-SCL	Note 1
X	Memphis, TN-Jacksonville, FL	do	Note 2
X	Tulsa, OK-Los Angeles, CA	do	Note 3
X	Tulsa, OK-Barstow, CA	SLSF-Avard, OK-ATSF	Note 3
X	Tulsa, OK-Amarillo, TX; Clovis, Belen, NM.	do	Note 4
X	Memphis, TN-North Platte, NE	SLSF-Kansas City-UP	Note 5
X	Memphis, TN-Little Rock, AR	SLSF-Little Rock, AR-MP	Note 6
X	Tulsa, OK-Fort Worth, TX	SLSF-Fort Worth, TX-MP	Note 7
	One direction only		
	Tulsa, OK-East St. Louis, IL	SLSF-St. Louis-A&S	Note 8
	Memphis, TN-East St. Louis, IL	do	Note 9

Unit coal trains

Loaded movement from origin to destination and return empty movement in opposite direction

	Mine origin	*Destination*	*Route and junction*
X	Various in Illinois	Rush Tower, MO	MP-Cape Girardeau, MO-SLSF
X	Various in Wyoming and Utah	do	UP-Kansas City-SLSF
	Various in Oklahoma	New Madrid, MO	SLSF-St. Louis-TRRA-IC
	Chelsea, OK	Kansas City, MO	SLSF-Kansas City-KCS
	Do	do	SLSF-Kansas City-ATSF
	Various in Kansas	Labadie, MO	SLSF-Kansas City-MP

Market territory served:

Note 1—Memphis and west to Southeast.
Note 2—Memphis and west to Florida.
Note 3—Tulsa and east to California.
Note 4—Tulsa and east to Amarillo and west.
Note 5—Southeast to North Platte and Pacific Northwest.
Note 6—Arkansas, Louisiana, and Southeast Texas points.
Note 7—Texas points.
Note 8—Tulsa and west to East St. Louis and beyond.
Note 9—Southeast to East St. Louis and beyond.
X—Locomotive power run-through.

FACILITIES

Frisco's principal terminal and yard facilities are located at Tulsa, Memphis, St. Louis, Kansas City, Birmingham and Springfield. Springfield also houses Frisco's main car and locomotive shop and repair facilities.

Maintenance of way.—As shown in table E-18, expenditures for maintenance of way have risen in each year since 1970, while average miles operated remained relatively constant. Maintenance-of-way expenditures for 1976 represent an increase of 95.9 percent over 1970 expenditures. These expenditures represent only 14.7 percent of operating revenues for 1976, which is significantly below the industry average of 16.44 percent for the same year.

We have converted maintenance-of-way expenditures into 1967 dollars by using the "Indices of Railroad Material and Wage Rates" published by the AAR, thus adjusting for inflation. A gradual rise is evident during the first 3 years, with the high for the period 1970-76 being reported in 1973. The $20.5 million spent in 1976 represents only a 6.2-percent increase from the 1970 expenditure of $19.3 million.

Frisco's crosstie replacement program has fluctuated during the past 7 years from a low of 1.69 percent in 1974 to a high of 3.37 percent in 1976. During 2 of the past 7 years Frisco's tie replacement rate was below our benchmark of 2.5 percent. (See table E-19.) The replacement rate for 1977 was 3.68 percent.

Rail replacement has averaged 164 miles per year for the past 7 years. In each of these years the rail replacement rate had surpassed our benchmark of 2.0 percent. During 1976 the rail replacement rate was 3.7 percent with 170 miles of track replaced. The rail replacement rates for the 10 years from 1961-70 were all above 2.0 percent, with the average for the period being 2.54 percent. For the past 20 years rail replacement appears to have been adequate. The rail replacement for 1978 was 184 miles or 4 percent of the system.

The weight of new rail laid per yard of average section was 127 pounds for 1976; for the previous 4 years it had been 132 pounds. The weight of new rail for 1977 and 1978 was 132 pounds.

Frisco's ratio of maintenance-of-way expenditures to operating revenues during 3 of the past 7 years was worse than the industry average, and only slightly higher than the industry average during the remaining years. For the 10 years prior to 1970 Frisco's maintenance-of-way ratio exceeded that of the industry in all but 1 year.

Frisco now has a strong maintenance-of-way program, with detector cars testing track-miles the equivalent of more than 100 percent of the average miles operated for the past 4 years.

TABLE E-10

Year	Miles of rail (new and relay)	Ties inserted	Track-miles resurfaced	Cubic yards of ballast applied	Track-mile tested with detector cars
1977	128	661	1,300	393	4,854
1976	170	619	1,380	470	4,700
1975	147	600	1,150	394	5,036
1974	168	346	1,000	527	5,036
1973	177	536	1,000	362	3,660

Deferred maintenance and delayed capital improvements.—Frisco's total deferred maintenance has declined more than 51 percent from $29.8 million at June 30, 1974 to $14.6 million at December 31, 1978. Delayed capital improvements have declined about 68 percent from $49.7 million to $15.6 million (see table E-23) during the same period. The larger part of both deferred maintenance and delayed capital improvements still outstanding is attributable to roadway rather than equipment.

Table E-23 also shows that at December 31, 1978 there were 6 slow orders outstanding, a decrease from 23 orders as of June 30, 1974. The mileage subject to these slow orders also declined from 52 to 24. This represents less than 1 percent of average miles operated.

Train performance.—Table E-24 presents selected train performance data for the period 1970-78, measured in transportation units produced, equipment utilization and average train speed. It shows that:

Average net tons per train have increased 10.7 percent from 1970 to 1976, and further increased significantly in 1978;

The average number of freight cars per train has remained relatively constant during the period;

The average number of loaded freight cars per train declined gradually, with the exception of 1973 and 1976, coinciding with the industry trend toward smaller trains;

Average tons per loaded cars have consistently increased during the period; and

The average train speed during the period varied slightly.

All five of the measures above increased during 1976 over the prior year.

Gross and net ton-miles per freight train-hour are presented in table E-25. By combining these load and speed factors, transportation output per train-hour can be examined. Both gross ton-miles and net ton-miles per freight train-hour fluctuated during the period 1970-76. Both measures have risen in recent years and recorded their period highs during 1976, which indicates that the carrier is moving more freight with its equipment. Gross ton-miles per freight train-hour for 1976 represents an 8.9 percent increase from 1970 while net ton-miles per freight train-hour for 1976 increased 6.4 percent. These elements reflect the loadings and speed of the average train. Frisco's performance of 35,200 net ton-miles per freight train-hour for 1978 is below the averages for both the western district and the total class I railroads (46,000 and 39,300 respectively).

Additions and betterments.—As indicated by table E-11, the total expenditures for additions and betterments have fluctutated during the past 7 years averaging $28.6 million per year. Expenditures for road have been fairly constant, except when increased expenditures were attributed to new communication systems in 1974 and 1978. During years with high equipment expenditures, major acquisitions of locomotives, and freight cars were made.

TABLE E-11

Expenditures for additions and betterments

	1970	1971	1972	1973	1974	1975	1976	1977	1978
					Millions				
Road	$5.6	$6.4	$5.7	$5.6	$12.0	$5.3	$6.6	$5.1	$13.7
Equipment	17.0	28.6	16.3	7.5	15.5	17.2	23.1	46.0	20.3
Total	22.6	35.0	22.0	13.1	27.5	22.5	29.7	51.1	34.0

Source: Form R1.

EQUIPMENT

Frisco owned and leased 18,548 freight cars in 1976, 9.6 percent higher than in 1967. With a 20.3 percent increase in the average capacity of its cars, Frisco's aggregate carload capacity increased 31.8 percent during the 1967-76 period. As shown in table E-12, over 90 percent of Frisco's 1976 fleet consisted of box, gondola, open hopper, and covered hopper cars.

TABLE E-12

Freight equipment—Frisco (1967 and 1976)

Car type	1967		1976	
	Number	Tonnage capacity	Number	Tonnage capacity
Box	6,789	356,837	8,874	567,207
Flat	1,774	99,610	1,276	79,072
Gondola	2,130	151,770	2,620	223,546
Open Hopper	3,363	207,995	2,601	207,878
Covered Hopper	2,148	178,905	3,102	290,205
Refrigerator	724	47,973	100	7,250
Tank	2	200	2	200
Miscellaneous	1	50	----	----
Total	16,931	1,043,340	18,548	1,375,358

Locomotive fleet.—The locomotive fleet has remained relatively stable since 1970. Prior to 1972 all locomotives were owned; subsequently 36 have been leased. The largest percentage change took place in 1976, when the locomotive fleet owned dropped by 7.3 percent from the 1975 total. (See table E-17.) The locomotive fleet as of December 31, 1978 was 438 units, of which 44 were leased.

In 1977, Frisco reduced its owned fleet by four locomotives. Reduction in the locomotive fleet could be a result of the carrier's efforts to concentrate on saving fuel more accurately by calculating the amount of horsepower required.

Maintenance of equipment.—The equipment maintanance ratio has fluctuated during the past 7 years from a low of 13.8 percent in 1970 to a high of 15.7 percent in

1972. For 1976 this ratio was 14.7 percent substantially below the average for class I railroads of 17.34 percent (see table E-20). In fact, Frisco has consistently reported a maintenance-of-equipment ratio below the industry average.

The effectiveness of an equipment maintenance program may be measured by the bad order for both freight cars and locomotives, the derailments caused by defective equipment, and the general quality of service offered the public.

The bad orders for freight cars, indicated by tables E-21 and E-22, has been substantially below the industry and western district averages. The locomotive bad order ratio, however, is rather high, at 10.1 percent as of December 31, 1977. During 1974 and 1975 the locomotive bad order was at a satisfactory level, but began to deteriorate during 1976. As of December 31, 1978 the locomotive bad order was a more acceptable 8.5 percent.

There was not an unusually high number of derailments on the Frisco caused by equipment defects. Of those derailments that did occur during 1976, 24.5 percent were caused by equipment defects (up from 19.2 percent during 1975). For 1976 the derailments caused by equipment defects for the western district and total class I railroads were 26.7 percent and 24.1 percent respectively.

There has not been a significant number of service complaints against Frisco as compared to the industry as a whole. This tends to indicate that Frisco provides good service.

Freight car performance.—Table E-26 presents data of freight car utilization. Car-miles per serviceable car-day varied during the 7-year period from 1970-76, ranging from a low of 64.2 to a high of 76.2. The road had an overall decrease of 4.6 percent during the period. During the same period net ton-miles per serviceable car-day ranged from 1,660 to 1,918. Both measures increased significantly in 1978, with Frisco reporting 81.5 car-miles and 2,339 net ton-miles per serviceable car-day.

Utilization as measured by average hours per day in freight train service was 3.16 for 1976, a decrease of 1.3 percent from 1970. The average increased to 4.01 hours for 1978. Frisco's freight cars spent more hours per day in freight train service than both the western district and total class I railroad averages. Car-miles and net ton-miles per serviceable car-day for 1978 are also better than total class I and western district averages.

Locomotive performance.—Presented in table E-27 are selected measures of locomotive performance from 1970-78. Gross ton-miles per locomotive-mile increased from 1970-73, followed by years of gradual declines before again increasing. The measure for 1978, was 1,258 below western district and class I averages. Locomotive-miles per day exhibited a 15.7-percent increase in 1976 over 1975, after yearly declines for the prior years. Locomotive-miles per day for 1978 was 266, significantly better than western district and class I averages. Frisco increased the number of active locomotives in 1976 by 8.0 percent. Miles per year per active locomotive increased 15.7 percent in 1976. This measure had been fairly consistent in earlier years, with declines during 1973-75. The 1978 result represents a decline from the high of 94.0 reported for 1977, yet the results were still better than western district and class I averages.

Frisco's strategy of matching locomotive horsepower with the tonnage of the train appears to be working.

Table E-28 exhibits additional efficiency indicators for the period 1970-78. Transportation gross ton-miles per man-hour of employment, an important indicator in measuring productivity trends in railroad labor, had risen steadily from 1970 to 1976, with a total increase of 21.9 percent. Frisco's performance in 1976 by this

indicator (2,047.5) was better than the western district (2,009.2) and the total class I railroads (1,684.6). An improvement is evident in the transportation ratio (ratio of transportation expense to operating revenues). The performance for 1976 (38.6) was better than the class I railroads (39.6) and equal to the western district carriers.

The operating ratio (ratio of operating expenses to operating revenues) declined to 75.93 for 1976, which is better than the averages for the western district and total class I railroads.

Maintenance summary.—Our study indicates that for 1976 Frisco's maintenance-of-way ratio was below the average for the industry. Four times between 1960 and 1976 the carrier's maintenance-of-way ratio was below the industry average. The other years during the period this ratio was only slightly above the industry average. For 1977 maintenance-of-way rate rose slightly to 14.9 yet it was still below the average for class I railroads. Crosstie replacement averaged 2.7 percent for the period 1970-76. Crosstie replacement level for 1977 was in line with the 2.7 average and 1978 results indicate a good replacement rate of approximately 4 percent. Rail replacement for 1976 was a good 3.7 percent with 170 miles of track replaced. Since 1961 rail replacement has been above our 2.0 percent benchmark. Five years during the 1970-76 period tie replacement was above our 2.5 percent benchmark. However, in all but one year between 1957-59 this replacement ratio was below 2.5 percent. While the rail replacement rate dropped to 2.7 percent for 1977 it rose to approximately 4 percent for 1978.

Management indicates in its annual report to stockholders that 4,854 miles of track were tested with detector cars during 1977 which represent more than the average miles operated by the carrier while 1,300 track-miles or 28 percent was resurfaced and 393,000 cubic yards of ballast were applied. Management has been pursuing a strong maintenance-of-way program for the past 5 years.

The maintenance-of-equipment ratio for 1976 was substanially below the industry average and continued to be despite a rise in 1977. However, other measures were used to determine the adequacy of Frisco's maintenance-of-equipment programs tend to indicate that the carrier is in good condition in all but one area. That area being locomotive bad orders which were 10.1 percent as of December 31, 1977 and decreased to 8.5 percent as of December 31, 1978. This ratio could be artifically high because the locomotive performance indicators on table XI are satisfactory. A possible reason for this high ratio in our opinion could be that the carrier is deferring locomotive maintenance in anticipation of retiring them in conjunction with its program to increase efficiency by matching locomotive horsepower with tonnage of the train. This ratio could be high due to the increase during 1976 of collisions which rose form 24 in 1975 to 41 in 1976.

Frisco is making progress in its attempt to eliminate the deferred maintenance and delayed capital improvements as reported in its Ex Parte No. 305 filings. Between its initial report of June 30, 1974 and December 31, 1977 Frisco had reduced its deferred maintenance by 55 percent and its delayed capital improvements by about 30 percent. The most recent information available dated December 31, 1978 indicates that Frisco's deferred maintenance increased about $1 million from the prior year while delayed capital improvement decreased by over $19 million for 1977.

Freight transportation performance measures show that this carrier is performing quite adequately in this area as indicated by the following: (1) indicators of average train performance all increased for 1975 to 1976 (see tables E-24 and E-25); (2) two of three indicators of average freight car performance increased from 1975 to 1976 while the third decreased by only 1 percent (see table E-26) although this measure (hours

per day in freight train service) decreased it was still above the 1976 averages for the western district and total class I railroads); (3) average locomotive performance in freight service measures indicate that while the number of active locomotives is decreasing their performance is improving (see table E-27).

In conclusion, we are not concerned about the viability of Frisco although several ratios are not in line with either western district or class I averages because: (1) its performance record is satisfactory; (2) no major maintenance deficiencies are evident; (3) management appears to be effective; and (4) it has been profitable for more than 20 years.

SAFETY

Accident record.—Frisco reported 225 accidents for 1976, or 17.2 accidents per million train-miles. The carrier's safety record deteriorated from 163 accidents in 1975 (12.9 accidents per million train-miles).

During 1976 derailments accounted for 143 of the total accidents, or 64 percent. Track defects, were related to 51 percent of the derailments, while 24 percent were related to equipment defects. These percentages approximate those of the western district and total class I railroads. However, derailments represent a smaller percentage of total accidents for Frisco than for the western district (77.3 percent or total class I railroads (78.7 percent).

Financial analysis.—On June 30, 1974, Frisco reported deferred maintenance—road of $26.2 million; deferred maintenance—equipment of $3.6 million; delayed capital improvement—road of $39.8 million; and delayed capital improvement—equipment of $9.9 million. Its December 31, 1978, report reflects declines in all four categories with reported amounts as follows: deferred maintenance—road of $12.1 million; deferred maintenance—equipment of $2.5 million; delayed capital improvements—road of $14.9 million; and delayed capital improvements—equipment of $0.7 million.

Total railway operating revenues increased annually, with the exception of recessionary 1975, from $161.0 million in 1968 to $338.2 million in 1978. The carrier's operating ratio remained rather stable between 1968-77, with a low of 73 percent in 1969 and a high of 78 percent in 1975. The ratio was a good 76 percent for 1977. Net railway operating income fluctuated during the period, averaging $22.4 million. Frisco has reported a profit in each of the 11 years and has paid approximately $6 million in dividends annually.

The carrier reported positive working capital from 1968 to 1977, but as a result of a change in the Uniform System of Accounts a negative working capital was recorded in 1978. Frisco has not had sufficient working capital to meet the monthly average working capital requirements since 1970. However, the average working capital ratio for the 10-year period 1968-77 was 1.22.

Net investment in transportation property increased from $286.3 million in 1968 to $565.9 million in 1978. The rate of return was 4 percent or above in each year except recessionary 1975, when it was 3.38 percent. The rate of return averaged 4.86 percent for the 11-year study period. The best rate of return of the period was 6.72 percent reported in 1978.

Long-term debt due after 1 year was relatively stable from 1968-77. In only two years, 1971 and 1977, did it fluctuate by more than 4 percent from the prior year. Long-term debt due within 1 year increased annually in all but one year during the period under study.

Debt-equity ratio exhibited a declining trend from 1968-73, increasing afterwards. During the entire period, including 1978 (adjusted for comparability with prior years), the debt equity-ratio was acceptable, ranging from a low of 43.9 percent to a high of 49.6 percent.

Fixed charges were easily covered in each of the 11 years under study. Only in recessionary 1975 did the coverage drop below 2.0 times. The average coverage for 1968-78 was a good 2.33 times.

Net rents have fluctuated, yet in recent years the trend has been toward increasing rents, due in part to the increase in leased equipment. In 1971 leased equipment represented 7.1 percent of the total fleet. In 1978 it represented 16.1 percent. From 1971-78 the aggregate capacity of the total fleet increased by 11.2 percent or 1.4 million tons, while the total fleet decreased by 3.7 percent to 18,200 units.

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TABLE E-13

Frisco—income items, dividends, 1968-78

	1978[1]	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total railway operating revenues---	$388,230	$350,317	$316,094	$275,446	$284,447	$254,969	$229,693	$212,820	$185,378	$175,184	$161,040
Total railway operating expenses---	349,693	267,535	240,068	215,387	215,634	197,727	176,175	158,766	140,519	127,786	117,558
Net railway operating income-------	38,013	28,108	22,474	16,104	21,622	17,859	22,589	22,433	18,396	20,511	18,650
Income available for fixed charges-	39,680	31,913	25,[illegible]67	18,942	29,396	23,961	26,426	24,602	22,282	24,719	21,940
Fixed charges----------	17,087	13,845	12,049	12,109	11,654	11,080	10,660	9,919	9,419	8,535	7,936
Total extraordinary items and accounting changes----------	- 0 -	- 0 -	- 0 -	3,452	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
Net income----------	20,617	16,715	11,956	8,870	16,322	11,454	14,340	13,200	11,385	14,693	12,528
Dividends appropriated----------	6,579	6,549	6,515	6,489	6,489	6,489	6,429	6,229	6,229	6,100	5,376
Provisions for deferred taxes------	- 0 -	- 0 -	1,635	1,800	1,940	--------	--------	--------	--------	--------	--------
Undistributed earnings----------	269	1,432	143	204	1,654	--------	--------	--------	--------	--------	--------
Restated net income[2]----------	20,348	15,293	13,448	10,486	16,608	--------	--------	--------	--------	--------	--------

[1]As of January 1, 1978, the Uniform System of Accounts was revised. Railway operating expenses for 1978 is not comparable to prior years.
[2]Net income was restated for comparative purposes by excluding provisions for deferred taxes and undistributed earnings from affiliated companies.

TABLE E-14

Frisco—working capital, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total current assets----------	$76,970	$61,970	$59,946	$54,332	$54,820	$56,497	$51,127	$48,544	$43,270	$46,650	$41,441
Total current liabilities---------	[1]93,213	56,312	55,024	45,548	44,732	47,228	39,778	38,264	34,971	33,216	30,397
Working capital----------	(16,243)	5,658	4,922	8,784	10,088	9,269	11,349	10,280	8,299	13,434	11,044
Total operating expenses----------	349,693	267,535	240,068	215,387	215,634	197,727	176,175	158,766	140,519	127,786	117,558
Property depreciation----------	3,153	3,086	3,026	3,019	2,493	2,440	2,409	2,367	2,243	2,216	2,207
Equipment depreciation----------	14,218	11,471	10,727	10,688	10,186	10,117	9,895	9,864	9,439	8,848	8,300
Net rents----------	([2])	(23,705)	(21,189)	(16,555)	(17,666)	(19,520)	(13,738)	(14,661)	(11,522)	(8,078)	(9,182)
Payroll and other railway taxes excluding income taxes----------	([3])	30,939	28,534	25,800	26,236	20,701	17,062	15,999	14,928	14,028	13,020
Operating expenses less depreciation plus net rent and taxes----	332,322	307,672	276,008	244,035	246,857	225,391	199,672	177,115	155,287	138,828	129,262
Monthly average working capital requirement----------	27,693	25,639	23,001	20,336	20,571	18,783	16,223	14,760	12,941	11,569	10,772
Working capital ratio----------	0.83	1.10	1.09	1.19	1.23	1.20	1.28	1.27	1.24	1.40	1.36

[1]Equipment obligations and other long-term debt due within 1 year are included in total current liabilities for 1978. Prior to 1978 they were not included.
[2]Net rents are included in operating expenses for 1978.
[3]Taxes are included in operating expenses for 1978.

TABLE E-15

Frisco--rate of return on net investment in transportation property, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Investment in transportation property	$762,609	$716,429	$673,902	$655,712	$640,918	$623,755	$616,819	$606,043	$569,477	$553,831	$540,492
Cash	1,179	(936)	3,457	1,860	2,445	321	2,757	3,685	2,675	3,680	1,329
Material and supplies	24,825	25,157	24,551	20,224	18,478	12,940	10,131	10,501	10,063	7,814	6,959
Depreciation and amortization	222,741	207,122	203,488	200,860	193,915	189,009	183,679	179,683	171,806	164,913	162,441
Net investment	565,872	533,528	498,421	476,936	467,926	448,007	446,028	440,526	410,489	400,412	386,334
Net railway operating income	38,013	28,108	22,474	16,104	21,622	17,859	22,589	22,433	18,396	20,511	18,650
Net railway operating income as a percent of net investment	6.72	5.27	4.51	3.38	4.62	3.99	5.06	5.09	4.48	5.12	4.83

TABLE E-16

Frisco--debt structure, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Long-term debt due within 1 year	$19,511	$17,555	$13,935	$12,751	$12,281	$11,529	$11,208	$10,758	$9,462	$9,654	$8,824
Long-term debt due after 1 year	[1]308,880	230,606	209,989	200,525	199,695	198,993	205,181	207,523	198,030	190,671	184,825
Total stockholders' equity	247,354	234,044	223,540	217,679	215,616	254,178	249,213	241,297	230,343	225,187	216,593
Debt-equity ratio--percent	55.5	49.6	48.4	47.9	48.1	43.9	45.1	46.2	45.2	45.8	46.0

[1]Long-term debt due after 1 year for 1978 is not comparable to prior years.

TABLE E-17

Frisco average miles of road operated, number of locomotives and freight cars owned and leased, and freight cars capacity, 1970-78

	Average mileage of road operated	Locomotives		Freight cars		Aggregate capacity of freight cars	Tons of revenue freight
		Owned and used	Leased from others	Owned and used	Leased from others		
						Tons	*Thousands*
1978----	4,538	394	44	15,458	2,937	1,399,074	42,372
1977----	4,554	391	36	15,923	2,952	1,416,612	40,638
1976----	4,599	395	36	15,500	3,048	1,375,358	40,271
1975----	4,616	426	36	15,759	3,121	1,378,167	36,004
1974----	4,668	416	36	16,285	2,951	1,369,764	39,950
1973----	4,677	419	36	16,577	2,248	1,322,107	39,996
1972----	4,728	443	-0-	16,967	2,443	1,284,297	38,656
1971----	4,759	423	-0-	17,546	1,352	1,258,409	37,921
1970----	4,506	418	-0-	16,789	1,584	1,226,543	37,178

Source: Form R1.

TABLE E-18

Frisco maintenance of way and structures, 1970-77

	Actual dollars	Per equated track-mile	Percent of operating revenues	Expenditures in 1967 dollars	Per equated track-mile in 1967 dollars
	Thousands			*Thousands*	
1977---------	$52,341	9,747	14.9	$21,513	$4,006
1976---------	46,318	8,440	14.7	20,495	3,735
1975---------	41,775	7,601	15.2	20,468	3,724
1974---------	41,196	7,401	14.5	22,811	4,098
1973---------	36,783	6,595	14.4	22,279	3,995
1972---------	34,661	6,165	15.1	23,547	4,188
1971---------	29,030	5,181	13.6	21,393	3,818
1970---------	23,646	4,324	12.8	19,287	3,527

Source: Moody's; Calculations with AAR—series QMPW 98.

TABLE E-19

Frisco crossties rail replacement and new rail laid, 1970-78

	Crossties replaced	Crossties replaced per equated track-mile	Percent of crossties replaced to total ties	Rail replacement miles of track	New railroad miles of track	New rail laid pounds per yard average section
1978------	714,260	133	N/A	184	70	132
1977------	661,269	123	3.68	128	76	132
1976------	618,611	113	3.37	170	71	127
1975------	600,154	109	3.25	146	43	132
1974------	347,604	62	1.69	168	95	132
1973------	536,275	96	2.65	177	109	132
1972------	619,518	100	3.07	201	99	132
1971------	450,581	79	2.40	161	80	126
1970------	397,399	73	2.81	126	72	132

Source: Moody's p. 472.

TABLE E-20

Frisco maintenance of equipment, 1970-77

	Actual dollars	Percent of operating revenues	1967 dollars
	Thousands		
1977---------	$52,417	15.0	$21,544
1976---------	46,616	14.7	20,627
1975---------	39,952	14.5	19,575
1974---------	41,434	14.6	22,942
1973---------	38,293	15.0	23,194
1972---------	36,058	15.7	24,496
1971---------	33,164	15.6	24,439
1970---------	25,528	13.8	20,822

Source: Moody's; Calculations with AAR--series QMPW.

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TABLE E-21

Frisco revenue freight cars in unserviceable condition monthly for 1977

Month	Heavy	Light	Total	Total owns owned	Percent to owned	Average western district
1977						
January	278	147	425	19,836	2.1	7.6
February	304	127	431	19,775	2.2	7.7
March	322	126	448	19,657	2.3	7.8
April	390	153	543	19,621	2.8	7.7
May	447	153	600	19,557	3.1	7.6
June	463	150	613	19,599	3.1	7.6
July	432	103	535	20,033	2.7	7.2
August	444	77	521	19,995	2.6	7.4
September	404	130	534	20,109	2.7	7.3
October	401	88	489	20,165	2.4	7.3
November	382	128	510	20,157	2.5	7.4
December	358	125	483	20,118	2.4	7.5
Monthly average	385	126	511	19,885	2.6	7.5

Source: AAR report No. 7712.

TABLE E-22

Frisco locomotive bad orders

	Total owned or leased	Number of units un-service-able	Percent to owned
June 30, 1974--------	451	15	3.3
September 30, 1974---	464	18	3.9
December 31, 1974----	452	15	3.3
March 31, 1975-------	454	12	2.6
June 30, 1975--------	462	11	2.4
September 30, 1975---	462	11	2.4
December 31, 1975----	462	12	2.6
March 31, 1976-------	462	36	7.8
June 30, 1976--------	441	55	12.5
September 30, 1976---	441	54	12.2
December 31, 1976----	431	47	10.9
June 30, 1977--------	411	34	8.3
December 31, 1977----	427	43	10.1
December 31, 1978----	438	37	8.5

Source: Ex Parte No. 305 filings.

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TABLE E-23

Frisco Ex Parte No. 305

	June 30, 1974	December 31, 1975	December 31, 1976	December 31, 1977	December 31, 1978
			Thousands		
Deferred maintenance--road------	$26,199	$22,006	$16,217	$10,875	$12,117
Deferred maintenance--equipment-	3,638	2,664	2,517	2,470	2,470
Delayed capital improvement--road----------	39,844	33,417	32,564	31,668	14,915
Delayed capital improvement--equipment----------	9,851	8,653	7,863	3,360	713
Crossties in need of replacement	125,000	41,000	41,000	-0-	4,000
Switch bridge ties in need of replacement----------	938,000	419,000	419,000	419,000	-0-
Tons of rail in need of replacement----------	136,000	136,000	136,000	136,000	26,000
Miles of track under slow order-	52	59	44	39	24
Number of slow order----------	23	31	32	11	6
Bad order (90 percent)----------	2.0	1.7	2.1	2.3	2.8

TABLE E-24

Frisco average train performance: selected data, 1970-78

Year	Net tons per train[1]	Freight cars per train[2]	Number of loaded freight cars per train[3]	Tons per loaded car[4]	Average speed (m.p.h.)[5]
1970----------	1,434	59.1	36.4	39.4	22.9
1971----------	1,386	57.7	34.6	40.0	21.3
1972----------	1,395	57.6	34.5	40.4	21.6
1973----------	1,513	58.5	35.7	42.3	20.1
1974----------	1,512	57.9	34.6	43.7	21.1
1975----------	1,537	60.0	34.1	45.1	21.8
1976----------	1,588	60.1	34.7	45.8	22.1
1977----------	1,603	58.7	34.7	46.1	21.4
1978----------	1,735	60.4	35.0	49.5	20.3

[1]Net ton-miles per train-mile (computed).
[2]Freight car-miles per freight train-mile.
[3]Cars per train x proportion of freight car-miles loaded (computed).
[4]Net ton-miles per loaded car-mile.
[5]Train miles per train-hour.

Source: "Operating and Traffic Statistics," AAR.

TABLE E-25

Frisco gross and net ton-miles per freight train-hour, 1970-78

Year	Gross ton-miles per freight train-hour[1]	Net ton-miles per freight train-hour[2]
	Thousands	
1970	73.3	32.9
1971	67.3	29.6
1972	69.3	30.1
1973	68.1	30.4
1974	71.1	31.9
1975	77.0	33.5
1976	79.8	35.0
1977	77.2	34.3
1978	76.0	35.2

[1]Does not include locomotives.

[2]Contents of cars.

Source: "Operating and Traffic Statistics," AAR.

TABLE E-26

Frisco average freight car performance: selected data, 1970-78

Year	Car-miles per serviceable car-day	Net ton-miles per serviceable car-day	Hours per day in freight train service
1970-------	73.3	1,780	3.20
1971-------	76.2	1,831	3.58
1972-------	72.6	1,759	3.36
1973-------	64.2	1,660	3.19
1974-------	73.5	1,918	3.48
1975-------	69.7	1,783	3.20
1976-------	69.9	1,847	3.16
1977-------	70.4	1,923	3.29
1978-------	81.5	2,339	4.01

Source: "Operating and Traffic Statistics," AAR.

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TABLE E-27

Frisco average locomotive performance in freight service: selected data, 1970-78

Year	Gross ton-miles per locomotive-mile	Locomotive-miles per day	Number of active locomotives	Miles per year per active locomotive
				Thousands
1970----------	1,098	254	287	92.6
1971----------	1,137	256	297	93.3
1972----------	1,143	256	314	93.3
1973----------	1,195	236	347	86.0
1974----------	1,174	226	356	82.6
1975----------	1,168	216	346	78.9
1976----------	1,206	250	310	91.3
1977----------	1,256	268	294	94.0
1978----------	1,258	266	310	93.4

Source: "Operating and Traffic Statistics," AAR.

TABLE E-28

Frisco efficiency factors

Year	Transportation gross ton-miles per man-hour employment	Transportation expense to operating revenue	Operating ratio
1978-----	N/A	N/A	90.07
1977-----	N/A	38.7	76.37
1976-----	2,047.5	38.6	75.93
1975-----	1,906.7	40.4	78.16
1974-----	1,880.1	39.2	75.63
1973-----	1,943.3	39.9	76.87
1972-----	1,866.5	37.3	75.75
1971-----	1,776.9	36.5	73.78
1970-----	1,679.8	39.5	74.50

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APPENDIX F

Pro forma financial statements for merged company

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Current assets		*Thousands*		
(701) Cash	$13,509	$3,457		$16,966
(702) Temporary cash investments	8,485	3,536		12,021
(703) Special deposits	993	902		1,895
(704) Loans and notes receivable	349	----------		349
(705) Traffic car service and other balances--debit	4,722	----------		4,722
(706) Net balance receivable from agents and conductors	54,928	9,301		64,229
(707) Miscellaneous accounts receivable	24,321	4,030		28,351
(708) Interest and dividends receivable	404	36		440
(709) Accrued accounts receivable	93,799	13,193		106,992

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Current assets--Continued		*Thousands*		
(710) Working fund advances----------	$1,508	$63		$1,571
(711) Prepayments----------	3,320	788		4,108
(712) Materials and supplies----------	178,196	24,551		202,747
(713) Other current assets----------	933	89		1,082
(714) Deferred income tax charges----	2,955	--------		2,955
Total current assets----------	388,482	59,946		448,428
Special funds				
(715) Sinking funds----------	1	--------		1
(716) Capital and other reserve funds	32,933	7,546		40,479
(717) Insurance and other funds------	1,356	352		1,708
Total special funds----------	34,290	7,898		42,188

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Investments		*Thousands*		
(721) Investments in affiliated companies	$271,267	$11,203	(a)$203	$282,700
Undistributed earnings from certain investments in account 721	142,645	6,575	(a)(6,575)	142,645
(722) Other investments	7,645	102	(a)(79)	7,668
(723) Reserve for adjustment of investment in securities--credit	(15,443)	--------		(15,443)
Total investments	406,114	17,880		417,570

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Properties		*Thousands*		
(731) Road equipment property and improvements in leased property:				
Road	$1,974,857	$341,034	(a)($117,932)	$2,197,959
(732) Equipment	1,523,321	316,000	(a)(220,693)	1,618,628
General expenditures	----------	186	(a)(186)	----------
Construction work in process	18,286	16,743	(a)(12,911)	22,118
Total	3,516,464	673,963		3,838,705
(733) Accrued depreciation--improvements on leased property	(842)	(14)	(a)14	(842)
(735) Accrued depreciation--road and equipment	(1,054,521)	(202,559)	(a)202,559	(1,054,521)

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976—Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Properties--Continued		*Thousands*		
(736) Amortization of defense projects—road and equipment---	($44,091)	($838)	(a)$838	($44,091)
Record depreciation and amortization----------	(1,099,454)	(203,411)		(1,099,454)
Total transportation property less recorded depreciation and amortization-	2,417,010	470,552		2,739,251
(737) Miscellaneous physical property----------	96,905	3,523	(a)(957)	99,471
(738) Accrued depreciation—miscellaneous physical property----------	(16,470)	(326)	(a)326	(16,470)
Miscellaneous physical property less recorded depreciation----------	80,435	3,197		83,001
Total properties less recorded depreciation and amortization---------	2,497,445	473,749		2,822,252

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Other assets and deferred charges		*Thousands*		
(741) Other assets	$5,593	$2,890	(a)($2,228)	$6,255
(742) Unamortized discount on long-term debt	4,356	1,767	(a)(1,767)	4,356
(743) Other deferred charges	15,074	1,577	(a)(1,216)	15,435
(744) Accumulated deferred income tax charges				
Total other assets and deferred charges	25,023	6,234		26,046
Total assets	3,351,354	565,707		3,756,484

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Current liabilities		*Thousands*		
(751) Loans and notes payable------	$17,343	----------		$17,343
(752) Traffic, car service and other balances--credit-----	---------	$78		78
(753) Audited accounts and wages payable----------	34,269	11,347		45,616
(754) Miscellaneous accounts payable----------	24,605	5,140		29,745
(755) Interest matured unpaid------	226	666		892
(756) Dividends matured unpaid-----	236	137		373
(757) Unmatured interest accrued---	16,754	3,603		20,357
(759) Accrued accounts payable-----	123,656	20,766		144,442
(760) Federal income taxes accrued-	15,069	2,102		17,171
(761) Other taxes accrued----------	46,705	4,561		51,266
(762) Deferred income tax credits--	---------	---------		----------
(763) Other current liabilities----	23,194	6,624		29,818
Total current liabilities (exclusive of long-term debt due within 1 year)---	302,057	55,024		357,081

See note at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Long-term debt within 1 year		*Thousands*		
(764) Equipment obligations and other debt	$55,877	$13,935	(c)($3,374)	$66,438
Long-term debt due after 1 year				
(765) Funded debt unmatured	536,597	105,608	(c)(40,018)	602,187
(766) Equipment obligations	359,554	104,101	(c)18,758	482,413
(769) Amounts payable to affiliate companies	59,712	275		59,987
Total long-term debt due after 1 year	955,863	209,984		1,144,587

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Reserves		*Thousands*		
(771) Pension and welfare service reserves	$11,066	$115	(e)$9,063	$20,244
(774) Casualty and other reserves	24,699	1,604		26,303
Total reserves	35,765	1,719		46,547
Other liabilities and deferred credits				
(782) Other liabilities	22,377	2,560		24,937
(783) Unamortized premimum on long-term debt	---	---		---
(784) Other deferred credits	47,195	392		47,587
(785) Accrued liability--leased property	14,633	75		14,708
(786) Accumulated deferred income tax credits	188,749	58,478	(b)(58,478)	188,749
Total other liabilities and deferred credits	272,954	61,505		275,981

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Shareholders' equity			*Thousands*	
(791) Capital stock issued:			(e)$2,036	
Common	$543,942	$113,969	(d)102,334	$648,312
Preferred	39,320	--------	(d)(113,969)	71,962
Total	583,262	113,969	(d)32,642	720,274
(792) Stock liability for conversion	429	--------		429
Total capital stock	583,691	113,969		720,403
(795) Paid in surplus	---------	19,019	(d)(19,019)	---------
Retained income				
(797) Retained income--appropriated	55,002	--------		55,002
(798) Retained income--unappropriated	1,090,168	90,554	(d)(90,554)	1,090,168
Total retained income--	1,145,170	90,554		1,145,170

Pro forma financial statements for merged company--Continued

BN/FRISCO BALANCE SHEET, HISTORICAL AND PRO FORMA, DECEMBER 31, 1976--Continued

	Historical		Pro forma (note 2)	
	BN (note 1)	Frisco	Adjustments	Combined
Treasury stock		*Thousands*		
(798.5) Less: Treasury stock------	($23)	($2)	(d)$2	($23)
Total shareholders' equity----------	1,728,838	223,540		1,865,850
Total liabilities and shareholders' equity--	3,351,354	565,707		3,756,484

See notes at end of table.

BN/Frisco notes to pro forma balance sheets, December 31, 1976

1. At December 31, 1976, BN had substantial lease commitments. Effective January 1, 1977, BN retroactively adopted FASB No. 13, "Accounting for Lease." To accomplish this, equipment properties, accrued depreciation—equipment, equipment obligations and other debt—current and equipment obligations long-term on the accompanying BN historical balance sheet have been increased $65,451,000, $29,574,000, $4,996,000, and $36,305,000, respectively, and accumulated deferred income tax credits reduced by $1,295,000. The cumulative retroactive effect of the change, $4,099,000 has been charged against retained earnings—unappropriated.

2. Under the merger agreement, BN will exchange 0.95 shares of its common stock plus one-half share of $2.125 no par value preferred stock, $25 redemption value, for each share of Frisco's common stock. The merger will be accounted for as a purchase. The cost of the assets acquired and liabilities assumed of $134,976,000, had the transaction occurred at December 31, 1976, has been allocated to such assets and liabilities. The *pro forma* adjustments applied to the historical balance sheet which would have been necessary to effect the transaction as of December 31, 1976, follow:

(a) Adjust the Frisco historical investment, properties (including amounts capitalized in accordance with FASB No. 13 for Frisco capital leases), other assets and deferred charges to the cost allocated to such assets and eliminate accumulated depreciation.

(b) Eliminate deferred income tax credits.

(c) Adjust the Frisco equipment obligations and other long-term debt to the present value of amounts to be paid and record the liability for Frisco capital leases which would be capitalized under FASB No. 13.

(d) Record 2,480,817 shares of common stock and 1,305,693 shares of $2.125 no par value preferred stock, $25 redemption value, of BN to be issued in exchange for all of the outstanding common stock of Frisco and eliminate the capital stock outstanding and preacquisition retained income of Frisco.

(e) Record the unfunded vested pension liability related to the Frisco pension plan and the difference between the option and exercise price of stock issuable under the Frisco stock option plan assumed by BN.

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Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
FIRST YEAR SUBSEQUENT TO MERGER

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
		Thousands		
(501) Railway operating revenues----	$1,536,777	$316,094	(1)$42,472	$1,895,343
(531) Railway operating expenses----	1,257,356	240,068	(2)30,394	1,527,818
Net revenue from railway operations----------	279,421	76,026		367,525
(532) Railway tax accruals----------	(158,109)	(30,728)	(3)(1,026)	(189,863)
(533) Provision for deferred taxes--	(2,847)	(1,635)		(4,482)
Railway operating incomes---	118,465	43,663		173,180
Rent income				
(504) Rent from locomotives---------	3,863	14		3,877
(505) Rent from passenger cars------	6	--------		6
(507) Rent from work equipment------	300	18		318
(508) Joint facility rent income----	8,205	1,086		9,291
Total rent income----------	12,374	1,118		13,492

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
FIRST YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
			Thousands	
Rents payable				
(536) Hire of freight cars and highway revenue equipment—debit balance	$43,947	$19,928	(4)($1,943)	$61,932
(537) Rent for locomotives	14,280	1,443	(5)2,058	17,771
(538) Rent for passenger train cars	744	--------		744
(539) Rent for floating equipment	--------	19		19
(540) Rent for work equipment	5	291		296
(541) Joint facility rents	4,777	636		5,413
Total rents payable	63,753	22,307		86,175
Net rents	(51,379)	(21,189)		(72,683)
Net railway operating income	67,086	22,474		100,497
Other income				
(509) Income from lease of road and equipment	18	9		27
(510) Miscellaneous rent income	8,585	866		9,451

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
FIRST YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Other income—Continued		*Thousands*		
(511) Income from nonoperating property	$44,315	$352	(6)$30	$44,697
(513) Dividend income (from investments under cost only)	226	---		226
(514) Interest income	2,863	382		3,245
(516) Income from sinking and other reserve funds	1,141	328		1,469
(517) Release of premiums on funded debt	---	---		---
(519) Miscellaneous income	9,373	1,783		11,156
Dividend income (from investments under equity only)	1,126	---		1,126
Undistributed earnings	7,621	143	(7)226	7,990
Total other income	75,268	3,863		79,387
Total income	142,354	26,337		179,884

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
FIRST YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Miscellaneous deductions from other income		*Thousands*		
(543) Miscellaneous rents	$617	$261		$878
(544) Miscellaneous tax accruals	4,807	44		4,851
(551) Miscellaneous income charges	5,101	665		5,766
Total miscellaneous deductions	10,525	970		11,495
Income available for fixed charges	131,829	25,367		168,389
Fixed charges				
(542) Rent for leased roads and equipment	684	128		812
(546) Interest on funded debt—not in default	56,432	11,787	(8)$6,038	74,257

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
FIRST YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Fixed charges—Continued		*Thousands*		
(547) Interest on unfunded debt----	$1,579	$15		$1,594
(548) Amortization of interest on funded debt----------	546	119		665
Total fixed charges--------	59,241	12,049		77,328
Income after fixed charges-	72,588	13,318		91,061
Other deductions				
(546) Interest on funded debt—contingent interest--------	---------	1,362		1,362
Net income transferred to retained income—unappropriated----------	72,588	11,956		89,699

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
SECOND YEAR SUBSEQUENT TO MERGER

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
		Thousands		
(501) Railway operating revenues----	$1,536,777	$316,094	(1)$62,063	$1,914,934
(531) Railway operating expenses----	1,257,356	240,068	(2)29,117	1,526,541
Net revenue from railway operations----------	279,421	76,026		388,393
(532) Railway tax accruals----------	(158,109)	(30,728)	(3)(4,685)	(193,522)
(533) Provision for deferred taxes--	(2,847)	(1,635)		(4,482)
Railway operating incomes---	118,465	43,663		190,389
Rent income				
(504) Rent from locomotives---------	3,863	14		3,877
(505) Rent from passenger cars------	6	--------		6
(507) Rent from work equipment------	300	18		318
(508) Joint facility rent income----	8,205	1,086		9,291
Total rent income----------	12,374	1,118		13,492

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
SECOND YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Rents payable		*Thousands*		
(536) Hire of freight cars and high-way revenue equipment—debit balance	$43,947	$19,928	(4)($1,943)	$61,932
(537) Rent for locomotives	14,280	1,443	(5)1,858	17,571
(538) Rent for passenger train cars	744	--------		744
(539) Rent for floating equipment	--------	19		19
(540) Rent for work equipment	5	291		296
(541) Joint facility rents	4,779	636		5,413
Total rents payable	63,753	22,307		85,975
Net rents	(51,379)	(21,189)		(72,483)
Net railway operating income	67,086	22,474		117,906
Other income				
(509) Income from lease of road and equipment	18	9		27
(510) Miscellaneous rent income	8,585	866		9,451

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
SECOND YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Other income—Continued		*Thousands*		
(511) Income from nonoperating property	$44,315	$352	(6)$30	$44,697
(513) Dividend income (from investments under cost only)	226			226
(514) Interest income	2,863	382		3,245
(516) Income from sinking and other reserve funds	1,141	328		1,469
(517) Release of premiums on funded debt				
(519) Miscellaneous income	9,373	1,783		11,156
Dividend income (from investments under equity only)	1,126			1,126
Undistributed earnings	7,621	143	(7)332	8,096
Total other income	75,268	3,863		79,493
Total income	142,354	26,337		197,399

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
SECOND YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Miscellaneous deductions from other income		*Thousands*		
(543) Miscellaneous rents	$617	$261		$878
(544) Miscellaneous tax accruals	4,807	44		4,851
(551) Miscellaneous income charges	5,101	665		5,766
Total miscellaneous deductions	10,525	970		11,495
Income available for fixed charges	131,829	25,367		185,904
Fixed charges				
(542) Rent for leased roads and equipment	684	128		812
(546) Interest on funded debt—not in default	56,432	11,787	(8)5,172	73,391

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
SECOND YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Fixed charges—Continued		*Thousands*		
(547) Interest on unfunded debt----	$1,579	$15		$1,594
(548) Amortization of interest on funded debt----------	546	119		665
Total fixed charges--------	59,241	12,049		76,462
Income after fixed charges-	72,588	13,318		109,442
Other deductions				
(546) Interest on funded debt—contingent interest--------	---------	1,362		1,362
Net income transferred to retained income—unappropriated----------	72,588	11,956		108,080

See notes at end of table.

Pro forma financial statements for merged company--Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
THIRD YEAR SUBSEQUENT TO MERGER

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
		Thousands		
(501) Railway operating revenues----	$1,536,777	$316,094	(1)$65,328	$1,918,199
(531) Railway operating expenses----	1,257,356	240,068	(2)27,133	1,524,537
Net revenue from railway operations----------	279,421	76,026		393,665
(532) Railway tax accruals----------	(158,109)	(30,728)	(3)(5,649)	(194,486)
(533) Provision for deferred taxes--	(2,847)	(1,635)		(4,482)
Railway operating incomes---	118,465	43,663		194,694
Rent income				
(504) Rent from locomotives---------	3,863	14		3,877
(505) Rent from passenger cars------	6	--------		6
(507) Rent from work equipment------	300	18		318
(508) Joint facility rent income----	8,205	1,086		9,291
Total rent income----------	12,374	1,118		13,492

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
THIRD YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Rents payable		*Thousands*		
(536) Hire of freight cars and highway revenue equipment—debit balance	$43,947	$19,928	(4)($1,828)	$62,047
(537) Rent for locomotives	14,280	1,443	(5)1,658	17,371
(538) Rent for passenger train cars	744	--------		744
(539) Rent for floating equipment	--------	19		19
(540) Rent for work equipment	5	291		296
(541) Joint facility rents	4,777	636		5,413
Total rents payable	63,753	22,307		85,890
Net rents	(51,379)	(21,189)		(72,398)
Net railway operating income	67,086	22,474		122,296
Other income				
(509) Income from lease of road and equipment	18	9		27
(510) Miscellaneous rent income	8,585	866		9,451

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
THIRD YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
		Thousands		
Other income—Continued				
(511) Income from nonoperating property	$44,315	$352	(6)$30	$44,697
(513) Dividend income (from investments under cost only)	226	---		226
(514) Interest income	2,863	382		3,245
(516) Income from sinking and other reserve funds	1,141	328		1,469
(517) Release of premiums on funded debt	---	---		---
(519) Miscellaneous income	9,373	1,783		11,156
Dividend income (from investments under equity only)	1,126	---		1,126
Undistributed earnings	7,621	143	(7)349	8,113
Total other income	75,268	3,863		79,510
Total income	142,354	26,337		201,806

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
THIRD YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Miscellaneous deductions from other income		*Thousands*		
(543) Miscellaneous rents	$617	$261		$878
(544) Miscellaneous tax accruals	4,807	44		4,851
(551) Miscellaneous income charges	5,101	665		5,766
Total miscellaneous deductions	10,525	970		11,495
Income available for fixed charges	131,829	25,367		190,311
Fixed charges				
(542) Rent for leased roads and equipment	684	128		812
(546) Interest on funded debt—not in default	56,432	11,787	(8)4,734	72,953

See notes at end of table.

Pro forma financial statements for merged company—Continued

BN/FRISCO INCOME STATEMENT HISTORICAL AND PRO FORMA DECEMBER 31, 1976
THIRD YEAR SUBSEQUENT TO MERGER—Continued

	Historical		Pro forma	
	BN (note 9)	Frisco	Adjustments	Combined
Fixed charges—Continued		*Thousands*		
(547) Interest on unfunded debt----	$1,579	$15		$1,594
(548) Amortization of interest on funded debt----------	546	119		665
Total fixed charges--------	59,241	12,049		76,024
Income after fixed charges-	72,588	13,318		114,287
Other deductions---------	---------	1,362		1,362
Net income transferred to retained income—unappropriated----------	72,588	11,956		112,925

See notes at end of table.

Notes to pro forma income statement for the first, second and third years subsequent to merger

	First year	Second year	Third year
(1) The net increase in railway operating revenues is due to:			
Increase in gross freight revenues due to traffic diversions	$43,318	$63,312	$66,644
Decrease in gross freight revenue above due to increase in TRRA revenues	(872)	(1,275)	(1,342)
Increase in revenue due to decrease in TRRA revenues associated with unchanged joint traffic	26	26	26
Net increase in railway operating revenues	42,472	62,063	65,328
The traffic studies of the bankrupt carriers, Milwaukee Road and Rock Island, were not given any weight for reasons stated within the decision. Therefore, the financial results derived from the studies were not considered. As indicated within this decision the Commission has determined that several carriers will suffer larger diversions than anticipated by the applicants. Thus, the amount of gross revenues diverted to the applicants could be increased by approximately $3 million.			
(2) The net increase in railway operating expenses is due to:			
Increase in operating expenses associated with traffic diversions based on the ICC Rail Form A formula	31,544	46,118	48,545
Reduction in expenses related to common points	(3,804)	(3,804)	(3,804)
Increase in operating division costs	40	40	40
Increase in costs related to conforming the information systems	1,613	1,015	712
Decrease in costs due to increased volume and efficiencies in purchasing	(840)	(840)	(840)
Decrease in overhead other than labor due to reduction of combined overhead costs	(2,557)	(4,231)	(4,336)
Increase in costs related to providing compatability in communication systems. Excluding capitalizable amounts of 12-volt power boards ($79,000), 12-volt AAR mount equipment ($253,000) and dispatcher call-in compatibility ($80,000) for first year. Excluding capitalizable amounts of switching facility ($400,000) for second year	886	90	66
Increase in costs to provide for equipment compatability less capitalizable costs for water coolers ($86,000), fuel heaters ($138,000), fuel fittings ($158,000), stationary fuel hydrants (35,000), and capital equipment installed in cabooses ($134,000) for first year. Less capitalizable cost for water coolers ($86,000) and capital equipment installed in cabooses ($134,000) for second and third years	329	314	299

Notes to pro forma income statement for the first, second and third years subsequent to merger—Continued

	First year	Second year	Third year
Increase in costs of labor and materials ($1,978,000) net of elimination of maintenance costs related to certain fleet reductions ($252,000) first year. Reduction of ($504,000) second year and ($756,000) third year	$1,726	$1,474	$1,222
Decrease in rail welding, car repair shop and locomotive repair costs on an annual returning basis (less $10,000 cost of airbrake cylinger reconditioning equipment for first year)	(744)	(1,049)	(1,049)
Decrease due to joint traffic cost savings	(1,114)	(1,114)	(1,114)
Decrease based on ICC Rail Form A variable costs due to the reduced movement of empty cars	(888)	(888)	(888)
Increase due to employee costs related to labor protection and exempt employee benefit costs. Net of reduction of labor overhead	9,760	(2,171)	(5,624)
Decrease in depreciation expense primarily due to reduction of the cost of depreciable assets recorded as a result of the application of purchase accounting for the merger	(4,697)	(4,697)	(4,697)
Net decrease in depreciable expense due to purchase of 17 cabooses and reduction in the number of new freight cars necessary to be purchased	(256)	(536)	(815)
Less amortization of increased pension liability of $9,063,000 over 15 years included in employee related costs	(604)	(604)	(604)
Net increase in railway operating expenses	30,394	29,117	27,113
(3) The change in railway tax accruals is based on BN's effective income tax rate for the year ending December 31, 1976, as applied to *pro forma* pretax income	1,026	(4,685)	(5,649)
(4) The decrease in rents payable is due to decrease in annual rental payments related to Frisco capital leases which have been capitalized in accordance with FASB No. 13	(1,943)	(1,943)	($1,828)
(5) Increase in rental payments for additional locomotives (net of $200,000 reduction due to 5 percent improvement in bad order ratio for first year. Net of $400,000 for second year and net reduction of $600,000 for third year)	2,058	1,858	1,658
(6) Increase in income from nonoperating property due to decrease in depreciation expense as a result of the application of purchase accounting for the merger	30	30	30
(7) The increase in undistributed earnings of subsidiaries is based on the reduction of railway operating revenues ($353,000) less a further reduction of railway operating expenses ($579,000) due to routing changes for the first year and ($515,000 and $847,000) reductions for the second year and ($542,000 and $891,000) for the third year	226	332	349

Notes to pro forma income statement for the first, second and third years subsequent to merger

	First year	Second year	Third year
(8) The increase in fixed charges is due to:			
Purchase of 17 cabooses to handle increased freight traffic	$47	$47	$47
Decrease due to reduction in the number of freight cars necessary to be purchased as a result of more efficient freight car utilization. The related interest is based on 80 percent of the equipment cost at a borrowing rate for similar obligations	(575)	(1,149)	(1,724)
Increase in interest due to amortization of the Frisco debt obligations existing at the merger date as a result of the adjustment of such debt obligations to fair value	6,566	6,274	6,411
Net increase in fixed charges	6,038	5,172	4,734

(9) Effective January 1, 1977, BN retroactively adopted FASB No. 13, "Accounting for Leases." See note 1 of "Notes to Pro Forma Balance Sheets." The statement of income for the year ended December 31, 1976, has not been restated due to the immateriality of the effect of the change on net income; however, certain reclassifications have been made relating to the amortization of capitalized leased property rights and the interest factor on capitalized lease obligations.

BN/Frisco statement of changes in financial position—pro forma for the first year subsequent to merger

SOURCES OF WORKING CAPITAL

	Thousands
Working capital provided by operations:	
Net income	589,699
Add expenses not requiring outlay of working capital:	
Retirement of nondepreciable property	1,786
Loss (gain) on sale or disposal of tangible property	(7,173)
Depreciation and amortization expenses	91,129
Net increase (decrease) in deferred taxes	4,482
Net decrease (increase) in parent's share of undistributed income for the year	(7,990)
Net increase (decrease) in noncurrent portion estimated liabilities	10,066
Net decrease in other assets and deferred charges (excluding decrease in unamortized discount on long-term included above)	9,719
Total working capital from operations	191,718
Working capital from sources other than operating:	
Proceeds from issuance of long-term liabilities	131,094
Proceeds from sale/disposition of carrier operating property	21,220
Proceeds from sale/disposition of other tangible property	9,999
Proceeds from sale/repayment of investments advances	53,808
Net decrease in sinking and other special funds	88,890
Proceeds from issue of capital stock	11,520
Net decrease in other assets	71
Total working capital from sources other than operating	316,602
Total sources of working capital	508,320

APPLICATION OF WORKING CAPITAL

Amount paid to acquire/retire long-term liabilities	139,555
Cash dividends	24,813
Purchase price of carrier operating property	181,307
Purchase price of other tangible property	11,225
Purchase price of long-term investments and advances	78,749
Net increase in sinking or other special funds	113,891
Purchase price of acquiring Treasury stock	1,088
Net decrease in other deferred charges	139
Net decrease in other liabilities	6,061
Total application of working capital	556,828
Net decrease in working capital	(48,508)

BN/Frisco note to pro forma statement of changes in financial position for the first year subsequent to merger

(1) In addition to combining the respective 1976 statements of BN (restated to reflect the retroactive adoption of FASB No.13, "Accounting for Leases") and Frisco, the following *pro forma* adjustments have been made:

Net income was increased $5,155,000. See "Pro Forma Statement of Income" for the first year subsequent to merger (exhibit A-17).

Depreciation and amortization were increased $549,000 to reflect the following:

Decrease in depreciation due to the reduction in book basis of Frisco operating property resulting from the application of purchase accounting and the capitalization of certain leases of Frisco under FASB No. 13	$(4,697)
Decrease in depreciation due to the reduction in book basis of Frisco nonoperating property resulting from the application of purchase accounting	(30)
Amortization of discount on Frisco long-term debt which resulted from the application of purchase accounting	5,532
Effect on depreciation expense of decreased purchases of freight cars due to improved utilization net of the additional purchase of 17 cabooses	(256)
Net increase	549

Parent's share of subsidiary's undistributed income was increased $226,000 due to diversion of traffic their operating expenses exceeded revenues.

Proceeds from issuance of long-term liabilities were decreased by 6,672,000 as follows:

Reduced equipment obligations due to improved utilization of freight cars	(7,184)
Reduced equipment obligations due to savings in purchase cost of equipment	(80)
Additional equipment obligation to finance the purchase of 17 cabooses	592
Net decrease	(6,672)

Proceeds from disposition of carrier operating property were increased $195,000 due to the ability to obtain higher prices for scrap.

Purchases of carrier operating property were decreased $7,223,000 as follows:

Lower purchase cost of freight cars	(100)
Betterments to ratios for compatibility	412
Betterments to Frisco locomotives and cabooses to provide compatibility	551
Additional track at Springfield, MO, rail welding plant	54

BN/Frisco note to pro forma statement of changes in financial position for the first year subsequent to merger—Continued

Drop table improvements at Springfield locomotive shop	$100
Purchase of 17 cabooses to handle traffic diversions	740
Decreased purchase of freight cars due to improved utilization	(8,980)
Net decrease	(7,223)

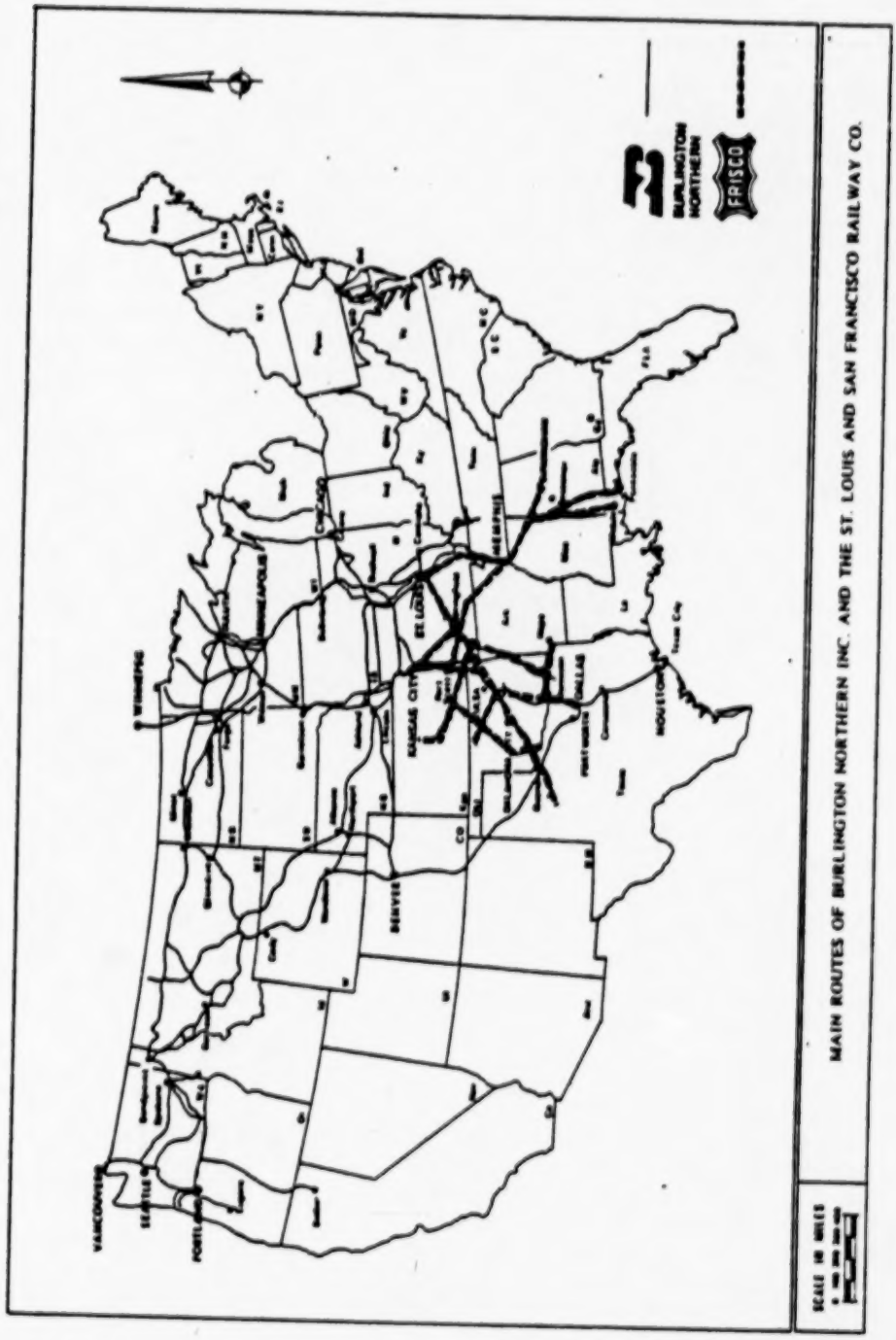
Payments of long-term liabilities were increased $1,554,000 due to the following:

Payment of pension liability applicable to Frisco employees recorded under purchase accounting and being retired over 15 years	604
Payment of principal on Frisco capitalized leases	950
Increase	1,554

Cash dividends were increased by $229,000 to adjust to dividend rates of BN shares to be issued pursuant to the merger agreement.

APPENDIX G

Map of BN and Frisco Systems



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APPENDIX H

Analyses of traffic diversion studies

GENERAL BACKGROUND

Traffic diversion studies have been prepared to: estimate gains and/or losses of traffic as a result of the merger and trackage rights; provide a basis on which to estimate the changes in railroad operations resulting from changed traffic flows; provide a basis on which to estimate the added or avoided costs resulting from the changed traffic flows; and assess the environmental impacts resulting from the merger.

The required methodology is designed to achieve a high degree of uniformity and comparability among the many traffic studies produced by adversary parties. The purpose of the traffic diversion studies is not to establish damages to affected railroads. This is much too narrow a viewpoint. Instead, traffic diversion studies has as their purpose the quantitative measurement of the expected general, short-term changes in the relative competitive strength of a merged rail system in relation to competing carriers. These estimated changes are then considered as factors to be weighed in determining whether or not a proposed transaction is in the public interest. We emphasize that traffic diversion studies result in estimates; while the traffic sample is drawn on an objective basis, the evaluations of divertibility of sample units are strictly judgmental, based on facts surrounding the sample unit.

The Commission will only examine the traffic diversion estimates which are in contention. In those instances where one traffic witness has made a traffic diversion evaluation clearly more reliable than a similar evaluation made by an opposing party, we accept the more reliable judgment and adjust the total estimated amount of diversion accordingly. In this manner, a finding is made of the estimated dollar amount of potential gross revenue diversions. The final figure, however, remains an estimate based on the expert opinions of the carriers' traffic evaluators. It is an estimate only of the impact on traffic flows resulting from the merger and from no other factors. Thus, the final diversion figure must be viewed as a short-term impact reflecting changes in competitive relationships resulting from the newly unified operations.

The full impact of the BN-Frisco merger will not occur until the third year following consummation, according to applicants' predictions (which are largely accepted by protestants). While the full impact would be reached in the third year, some of the competitive impacts would continue through ensuing years. However, the traffic diversion estimates must be viewed as short-term projections since so many economic and operational changes take place annually in the rail industry that the competitive impacts of a specific rail unification in time become blurred, if not totally unidentifiable. These other economic and operational factors include: (1) other rail unifications; (2) upward and downward changes in the national and regional economies; (3) changes in operations throughout the industry through utilization of new routes; (4) institution of run-through train schedules; (5) changes in specific rates or even rate levels; (6) increases (or decreases) in the intensity of competition from other modes of transportation; (7) abandonments; and (8) changes in the level of cooperation between two or more railroads competing with the newly unified railroad (in short, the retaliatory actions taken by the competitors).

The foregoing factors represent some of the reasons why traffic diversion estimates cannot be construed as damages or as economic factors to be cast in concrete. To

conclude otherwise, we would be forced to consider the transportation industry as static, a viewpoint which, at best, would be myopic.

Our findings of traffic diversion totals are simply reasonable estimates of overall short-term competitive impacts on specific carriers. Car-by-car and dollar-for-dollar precision is not necessary. Where opposing estimates are reasonably close, we have accepted the estimates as providing minimum and maximum figures delineating a practical range within which actual diversions will most likely occur based on on all of the pertinent traffic evidence.

Because of the stipulations entered into by applicants and most protestants, it is only necessary to analyze the traffic studies submitted by Soo Line, Katy, ICG, Rock Island, and Milwaukee Road, along with the traffic gain studies submitted by applicants. A specific analysis of the Milwaukee Road and Rock Island traffic studies has been vitiated by intervening events affecting both railroads.

APPLICANTS' TRAFFIC STUDIES

Applicants' traffic studies were developed to determine the impact that the consolidation would have on applicants' traffic and revenue and also the impact on other carriers. The Frisco prepared its own traffic study and BN prepared traffic studies covering BN, FW&D, and C&S traffic.

BN's traffic study was based on an initial sample of all traffic sampled at the rate of 1 percent for BN and 5 percent for FW&D and C&S. Local traffic (sampled separately), less-than-carload (LCL), and company material traffic were then eliminated, as were movements in which Frisco participated. Thus, for purposes of the merger proposal, the BN population sampled was all revenue carload interline settlement abstracts taken into account in 1976 except those governing interline traffic handled jointly with Frisco and QAP, which the Frisco sampled and studied exclusively to avoid duplication. In like manner, FW&D and C&S populations sampled were the same, except FW&D excluded joint Frisco-QAP, and BN interline traffic, while C&S excluded those abstracts covering movements joint with Frisco and QAP, BN, and FW&D. The interline settlement abstract was utilized as the BN data base. In BN's opinion, these abstracts reflect, subject to audit, the full and final routing and divisions of revenue for all participating carriers. BN points out that the interline abstract does not, however, reflect full waybill information. Notably missing are identifications of consignors and consignees.

Applicants note that under Commission guidelines, they could have limited their sample to only those geographic populations of interline traffic which would be affected by a merger of BN and Frisco. They chose, however, to sample the entire population of interline traffic movements and local traffic movements so that they would have readily available a sample data base suitable for analysis if further traffic studies were to become necessary during these or other merger proceedings.

BN's sample abstracts were stratified by class of traffic (forwarded, received, intermediate).

The size of the combined interline and local traffic samples for BN, FW&D, and C&S were: BN, 17,382 abstracts representing 23,829 cars; FW&D, 1,928 abstracts representing 3,172 cars; C&S, 1,117 abstracts representing 2,176 cars. Expanded to 100 percent the BN sample represented 1,738,200 abstracts or 2,382,900 cars; FW&D sample 38,760 abstracts or 63,430 cars; and the C&S sample 22,340 abstracts or 43,520 cars.

Computer printouts of sample traffic were provided to enable the study participants to identify movements that could be affected by a merger of BN and Frisco for further in-depth study. The identified interline movements were classified as "involved traffic." "Involved traffic" was BN, FW&D, or C&S sample movements which moved, or could have moved to, from, or through territories served by Frisco. BN states that these sample movements were carefully selected so that no sample movement was overlooked which could have been even remotely influenced by a merger.

Specifically, "involved traffic" was defined in the BN-FW&D-C&S studies as follows:

BURLINGTON NORTHERN

1. All BN sampled interline traffic originating or terminating in:

Alabama	Kentucky	Oklahoma	Virginia
Arkansas	Louisiana	South Carolina	West Virginia
Florida	Mississippi	Tennessee	California[1]
Georgia	North Carolina	Texas	Arizona[1]
			New Mexico[1]

[1]Excluding that traffic moving to or from Montana, Wyoming, Colorado, Idaho, Washington, Oregon, British Columbia, Alberta, and Saskatchewan.

2. All BN sampled interline traffic originating or terminating at Frisco-served stations in Kansas and Missouri, excluding Kansas City and St. Louis, which are common with BN.

3. All BN sampled interline traffic interchanged at Centralia and Woodlawn and not identified above.

4. All BN sampled interline traffic moving between the Pacific Northwest and eastern points when routed through Frisco-served territory.

FORT WORTH AND DENVER

1. All sampled interline forward traffic *except* that destined to the following States and Provinces:

Alberta	Idaho	Saskatchewan
Arizona	Montana	Texas[1]
British Columbia	Nevada	Utah
California	New Mexico	Washington
Colorado	Oregon	Wyoming

[1]Other than Frisco common points.

2. All sampled interline received traffic *except* that originated in the States and Provinces indicated above.

3. All sampled interline intermediate traffic *except* that which moved between the States and Provinces indicated above.

The exceptions noted above do not apply if the movement was routed via a Frisco-served junction such as Kansas City.

COLORADO AND SOUTHERN

All sampled interline traffic which either originated or terminated in:

Alabama	Kansas	Missouri	Tennessee
Arkansas	Kentucky	North Carolina	Texas
Florida	Louisiana	Oklahoma	Virginia
Georgia	Mississippi	South Carolina	West Virginia

The resulting pools of "involved traffic" were:

	Involved traffic		Extrapolated to 100 percent	
	Abstracts	Cars	Abstracts	Cars
BN	2,258	3,207	225,800	330,700
FW&D	493	869	9,860	17,380
C&S	170	409	3,400	8,180

Frisco's traffic study was conducted in basically the same manner. Frisco's data base was its Management Information Control System, which is a computer record of waybill information supplemented by revenue settlement data. Frisco utilized a sample of 1 percent. As stated earlier, Frisco studied traffic it handled jointly with BN, FW&D, and C&S, while the latter three carriers excluded such traffic to avoid duplication.

Frisco studied all sample traffic except:

1. Local traffic.
2. Traffic moving between stations in Alabama, Arkansas, Florida, Georgia, Kansas (other than BN stations, excluding Kansas City), Kentucky (other than BN stations, excluding Kansas City and St. Louis), North Carolina, Oklahoma, South Carolina, Tennessee, and Frisco-served stations in Texas.
3. Traffic moving between stations in Arkansas, Louisiana, and Missouri (other than BN stations excluding Kansas City and St. Louis).
4. Traffic moving between stations in Louisiana, on the one hand, and stations in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee, on the other.
5. Received coal traffic from southern Illinois.

QAP stations were considered as Frisco stations.

Frisco's sample initially contained 9,839 units. After deletion of all units for which accounting settlements were *not* made in 1976, it was comprised of 7,915 car, container, or trailer movements.

Of these, 37,747 were determined to be not involved, leaving a total of 4,168 movements for study as "geographically susceptible to diversion." Of the 4,168 movements Frisco studied in detail, 3,777 were judged to be nondivertible, and the remaining 791 movements were found to be divertible, representing a $23,026,300 net revenue gain to the merged company.

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Applicants jointly developed procedures for evaluating the sample movements. Movements were evaluated initially concurrently by two or more sales agencies in the field. Written instructions were sent to all field evaluators. Field evaluators added objective data, such as routing control, identification of serving railroads, team tracks, type of switching arrangements, track connections, transit, stopoffs, equipment, shipper routing policies, how the movement was routed when tendered, and protective services.

Regional sales managers, and then final evaluators, reviewed the initial evaluations and data entries, making changes, where necessary, to remedy incorrect, incomplete or inconsistent data or evaluations.

The evaluations of divertibility were based on 10 traditional criteria: service; relations with shippers; equipment ownership; availability of equipment; shipper traffic allocation policies; physical conditions at the location of shippers and receivers; rate and route restrictions; special services, such as transit; how the shipment was routed, i.e., shipper-routed with junctions specified, shipper-routed without junctions specified, or carrier-routed; and other factors, such as shipments moving to diversion and reconsignment points. These criteria were applied assuming that BN and Frisco were merged and their rail subsidiaries were fully coordinated. In all other respects, 1976 conditions were assumed. Frisco states that it did not have any way of determining the possibility of retaliatory routing practices by other railroads and that this factor was not used in evaluating divertibility of traffic. BN believes there would be no retaliation, but did not rule out the possibility.

In measuring traffic benefits, the applicants assumed that only 65 percent of the traffic gains would be realized in the first year, 95 percent in the second year, and 100 percent in the third year. The timing of diversions is based upon the class of traffic. BN estimates that in the first year, 70 percent of interline forwarded, 53 percent of interline received, and 58 percent of overhead traffic would be diverted.

Applicants' traffic studies have been described in some detail. Some of the protestants have criticized the evaluations made by applicants' traffic witnesses. However, it is not necessary to detail these criticisms, nor is it necessary to adjust applicants' estimates.

Applicants prepared their studies prior to filing the application. Prospective applicants are not required to sample the traffic records of nonapplicant carriers. Potential protestant carriers are not shown to them except in the most obvious situations. Thus, applicants are required to sample only their own traffic records. For the Commission to require anything beyond this would be an extreme burden on any applicant. It is highly doubtful that a nonapplicant carrier would permit a prospective applicant the right to examine the nonapplicant's traffic records.

Therefore, protestants must sample their own traffic to determine if traffic *not* jointly handled with applicants would be divertible. The protestant, of course, may also sample traffic handled jointly with applicants in order to test applicant's estimates or obtain greater precision. In this proceeding, applicants' and protestants' estimates of diversion on joint traffic are remarkably close. Bearing in mind that traffic studies yield estimates subject to standard margins of error, we would normally consider that the probable diversions of joint traffic from protestants are equal to the applicants' estimates plus or minus two times the standard error when the judgments on diversions are in agreement. When substantial disagreements occur, we are compelled to analyze individual judgments and adjust the parties' estimates according to our findings.

Soo Line and ICG contend that applicants' sample was not large enough to yield sufficient precision. To achieve a high degree of precision for individual carriers, applicants would be required to stratify their traffic records by connecting carrier and then draw a sufficient sample from each stratum. The resulting sample, of necessity, would be larger. The burden on applicants to produce and analyze the larger sample would be considerably increased and, to the extent connecting carriers do not participate as protestants in the proceeding, the extra resources would be wasted. Similarly, the Commission would be burdened with additional and irrelevant evidence. However, if greater precision is desired, any other concerned railroad may present a traffic study of its own. Thus, Soo Line and ICG have pointed out a necessary potential weakness in applicants' traffic studies.

Traffic studies serve an important role in the merger process. Prospective applicants would not pursue a merger without knowing with reasonable precision the additional income they can expect to generate. Traffic studies are the principal and most practical tool for this purpose. Such studies attempt to predict the changes in revenue and traffic flows and in turn serve as the basis for predicting how the unified operations will be conducted. Finally, once the operating plan has been determined, impacts on labor, local and regional economies, the environment, and energy use can be estimated. From this, financial results can be predicted.

Applicants have the burden of showing that their proposed transaction is consistent with the public interest. A major part of this burden involves showing the benefits which could be expected from the proposal. Traffic studies are therefore a necessary part of the evidence which must be produced.

In this proceeding, applicants have produced well designed traffic studies which meet our criteria. We conclude that applicants' estimate of gross revenue gains of $66.1 million in the third year following merger is reasonable as a minimum. Additional revenue gains will be forthcoming as result of diversions from Soo Line, ICG, and Katy detailed in those carriers' studies. Further revenue gains are possible from those carriers which have entered into agreements with applicants. Only two of those carriers (CNW and Santa Fe) have presented evidence of the probable diversion. We do not know if those carriers considered specific dollar amounts of diversions when negotiating with applicants.

Further revenue may be generated from traffic previously moving over Milwaukee Road or Rock Island. Nevertheless, the massive fiscal and physical deterioration of those two railroads, and not the prospective merger of BN and Frisco, is responsible for their loss of traffic.

The evaluations made in the traffic studies produced the results shown in table 2 (in the body of this decision), which contains the gross revenue gains or losses estimated for other carriers.

SOO LINE TRAFFIC STUDY

Soo Line conducted a traffic study to determine the effects of the merger on its traffic and revenues and the impact of its western gateway condition. The study covered Soo Line's revenue carload traffic moved in calendar 1976, which totaled 400,255 carloads. After screening to remove certain categories of traffic clearly not divertible, the number of carloads to be studied was reduced to 43,577.

The 43,577 carloads studied were comprised of:

(1) Interline forwarded and interline terminated traffic having origin or destination at the Twin Cities, the Twin Ports (Duluth-Superior) and two Wisconsin stations

competitive with GB&W moving to or through territories served by Frisco via either the Twin Cities or Chicago gateways.

(2) Less than 25 percent of Soo Line bridge traffic, the preponderance of which originated in Canada on the CP or the CN or their subsidiaries, interchanged to Soo Line, and delivered to connections at the Twin Cities or Chicago.

All other interline carloads and all carloads moving locally on Soo Line were eliminated from consideration.

The frame of 43,577 carloads was stratified into 24 strata defined by the class of traffic (interline forwarded, interline received, and overhead) and the route. A total of 1,060 sample carloads were drawn from the stratified frame, and waybill data were accumulated for each sample car. One person evaluated the data and made the judgment as to the divertibility of each car.

The evaluator determined that 561 of the sample cars were either totally or partially divertible. The number of sample cars in each class of traffic, the number of sample cars determined to be divertible, and the estimated diverted revenue (expanded from sample car revenue) are shown below:

Class	Total sample cars	Number of cars diverted				Diverted revenue (expanded)
		100	50	25	0	
		Percent				
Interline forwarded	60	----------	7	6	47	$50,480
Interline received	145	2	5	33	105	158,128
Overhead	855	40	90	236	489	1,072,671
	1,060	42	102	274	642	1,281,280

The standard error (i.e., the statistical measure of imprecision) of the $1,307,577 estimate is $75,333. The sampling procedures utilized by Soo Line are acceptable.

The judgments made by Soo Line on the divertibility of each sample car were based on conventional criteria concerning routing:

1. Plant location at origin and destination.
2. New single-line service.
3. Car supply.
4. Solicitation.
5. Industrial development by the merged company.
6. Allocation.
7. Carrier rate actions.
8. Transit, reconsignment and stopoff privileges.
9. Other specific factors:

a. New single-line service between western States, Canadian junctions, the Twin Cities, and the Twin Ports on the one hand, and all present Frisco stations on the other hand.

b. Increased train frequency.

c. Increased car supply.

d. Increase in expeditious movement of traffic through BN's Northtown Yard in Minneapolis to and from "southern and southeastern United States territory."

e. Availability of Frisco equipment for use by, or assigned to, industries located on merged company and elimination of car service rules for cars owned by either applicant when moved to or through areas served by other applicant.

f. Availability of BN's car information system to Frisco customers.

The following data were accumulated for each sample car:

1. Origin city and State.
2. Destination city and State.
3. Complete routing.
4. Consignor and consignee.
5. Carrier serving consignor or consignee, where deemed material.
6. Weight and freight charge.
7. Soo Line proportion of freight charges.
8. Transit information (except on overhead traffic).
9. Traffic originating or terminating at Soo Line team tracks (open or closed).
10. TOFC plan number 11. Car initial, number, and type (see text below).

The car type was determined and considered only in those instances where considered material. Car type data for all sample movements were determined later and were provided by Soo Line as a supplement to the traffic study.

Soo Line's records do not contain actual waybills for overhead traffic. Rather, interline abstracts are maintained as records for this traffic. The abstracts show only origin, destination, and route information. As a result, Soo Line attempted to "reconstruct" the waybills for the overhead movements to have adequate data on which to base diversion judgments. No attempt was made to obtain actual waybills from other railroads which had participated in the movements. Consignor and consignee identities were obtained, but Soo Line was unable to determine transit arrangements, if any, and assignment of equipment (other than by Soo Line). Soo Line believes that such items, while helpful, are not crucial to a diversion judgment.

The traffic evaluator did not in all instances indicate on his worksheets the reasons for divertibility.

General criteria for determining the degree of divertibility (100, 50, or 25 percent) were developed for each class of traffic studied. For example, for interline forwarded traffic, if a movement was from a BN industry to a Frisco industry, a 100-percent loss was assigned; a 50-percent loss was applied to movements from a BN industry to the Southeast via Birmingham or Memphis. In short, these general criteria were assigned on the basis of the physical characteristics of movements. The application of the criteria was subject to adjustment when the criteria listed earlier were deemed to change the competitive picture.

As to joint traffic between applicants and Soo Line, Soo Line's traffic study resulted in an estimate of $223,788 in losses, while the applicants' estimate was slightly higher, at $243,200. Considerable controversy exists, however, conerning Soo Line's estimate of slightly over $1 million in diversion of traffic *not* handled jointly with applicants. Since applicants' study covered only traffic which the applicants handled, the only estimate of diversion of nonjoint traffic was that produced by Soo Line itself.

The bulk of Soo Line's estimated revenue loss is attributed to diversion of cars from Chicago-Twin Cities to Noyes and Portal. The largest portion of the gross revenue loss estimated by Soo Line was comprised of overhead movements ($1 million). Soo Line states that only $281,196 in revenue would be diverted on overhead traffic interchanged with CP. The largest single amount of overhead traffic losses ($483,707) was on movements between the Twin Ports and Chicago. Soo Line states that most of this diverted traffic originates or terminates on CN or its short-line connections, and is interchanged with Soo Line by the DW&P (a CN subsidiary) at the Twin Ports. Soo Line's connections at Chicago for the traffic are preponderantly those which serve "southern and southeastern points."

Soo Line claims that this traffic represents a market for which both Soo Line and BN vigorously compete. Applicants respond that *every* movement between the Twin Ports and the Twin Cities, which was considered divertible by Soo Line could have been handled in 1976 by BN, not only between the named points, but beyond Chicago to and from gateways such as Kansas City, St. Louis, Centralia, and Woodlawn. In short, BN already had the capability in 1976 to handle the same traffic further than Soo Line. Applicants contend that since Soo Line was in the routing rather than BN, factors other than longer, single-line service were controlling, and that the merger would not change those factors.

Some $302,227 of the Soo Line overhead traffic revenue considered divertible by Soo Line originated or terminated on CP. Applicants contend that it is unrealistic to expect Soo Line's parent to short-haul or eliminate Soo Line on this traffic. Soo Line replies that the diversion would take place because shippers, not CP, would divert the traffic and that similar traffic today is routed via BN instead of Soo Line. Further, Soo Line points out that the $302,227 diversion represents less than 2.5 percent of the CP-Soo Line traffic which is competitive with a CP-BN routing.

On balance, we find applicants' arguments well taken. Although Soo Line might lose a very small part of this traffic, the traffic is actually as susceptible today to diversion by BN as it would be after the merger. The merger in and of itself would not cause this traffic to be diverted. Further, if the merged company does in fact provide an improved level of service for this traffic, it would be incumbent on Soo Line and its Chicago connections to improve their service also.

Similar arguments were made by applicants and Soo Line with respect to the latter's estimate of a $454,241 diversion of joint CN-DW&P-Soo Line traffic moving south of the Twin Ports gateway, where it was interchanged between DW&P and Soo Line. Our findings are the same: If the merged company were to provide improved service, Soo Line and its connections would be encouraged to improve their services. We recognize that such actions would require initiative and innovations by Soo Line and its connections. That, however, is free enterprise.

We have consistently made findings similar to those above with respect to Soo Line's overhead traffic in prior merger and control cases.[1]

In summary, we find that as to traffic handled jointly between Soo Line and applicants, the latter's estimate of $243,000, higher than Soo Line's own estimate, is a reasonable minimum of expected diversion. As to the nonjoint traffic, we find that Soo Line's estimate of slightly over $1 million should be reduced *at least* by the approximately $750,000 attributable to the Canadian traffic discussed above. Thus, the diversion would be no more than $490,000, and therefore insignificant.

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[1] See *Chicago & N. W. Ry. Co.—Merger—Chicago G. W. Ry. Co.*, 333 I.C.C. 236, 249 (1968); and *Chicago & N. W. Ry. Co.—Control*, 347 I.C.C. 556 (1974).

Finally, it should be noted that even if we were to give full weight to Soo Line's estimate of $1.3 million in diversion, the amount represents less than 0.7 percent of Soo Line's 1976 railway operating revenue and does not constitute an amount which would adversely affect Soo Line's ability to provide adequate and essential rail service to the public.

To measure the impact of the western gateway condition, Soo Line conducted a traffic study based on the traffic interchanged between itself and BN at the Twin Cities and the Twin Ports in 1976. The frame of traffic studied consisted of 16,315 cars interchanged at the Twin Cities and 466 cars interchanged at the Twin Ports. Interline forwarded traffic and interline received traffic were stratified to separately identify cars destined (1) to BN stations in Minnesota and (2) all other traffic. Overhead traffic was stratified by direction and on-coming or off-going gateways.

The total of 16,781 carloads were placed in 10 strata. A total of 205 carloads was selected to comprise the random sample. Evaluation of the sample cars was based on criteria and underlying data substantially the same as employed in Soo Line's traffic diversion study. However, the traffic evaluator obtained complete waybill or waybill abstract data only on sample movements for which he had already determined that a gain would accrue to Soo Line. Of the 205 sample carloads, 57 carloads were determined to be gained (Tr. 3929-3930). Similar methods were also employed in estimating the likelihood of a movement being gained, i.e., percentages were applied to each movement judged as a gain.

Revenue estimates were calculated on the basis of division formulae set forth in existing Western Trunk Line division sheets for transcontinental traffic, using mileage prorates west of the Twin Cities gateways, subject to a 25-percent minimum.

All sample carloads were interchanged at the Twin Cities. Soo Line estimates that imposition of its western gateway condition would result in a gain of 1,370 carloads, of which 1,009 would be rerouted via Minot, 194 via Detroit Lakes, 69 via Erskine, 90 via Thief River Falls, and 8 via Bismarck. About 83 percent of the traffic considered by Soo Line to be gained is comprised of interline forwarded movement.

ICG TRAFFIC DIVERSION STUDY

Applicants estimate that ICG would lose $6,592,500 in revenue to the merged company. Applicants' estimates, as noted earlier, are based only on their own traffic.

ICG conducted its own traffic diversion study, designed to ascertain the amount of traffic which would be diverted by the merged company; and to estimate the gains in traffic which ICG could expect if its trackage rights condition were imposed. To accomplish this, a sample of ICG movements were drawn and evaluated under each assumption.

The data base is all waybill information and settlement data, as well as car movement data and the estimated cost of transportation. The data utilized from this system consists of 1,662,252 carloads of traffic settled in 1976, which closely corresponds to the 1,624,836 carloads actually handled in 1976.

In developing the sample the 1,662,255 carloads were first sequentially grouped into 1,000 clusters, each containing approximately 1,660 records. Fifty of these clusters were randomly selected for possible use in the sample. The first 15 of the 50 randomly chosen clusters were used as ICG's sample. The 15 clusters, or subsamples, contained 54,938 records and were deemed a sufficient sample for further analysis.

From each of the 15 subsamples, the following traffic was eliminated as being nonrelevant, first by computer and then, as necessary, manually:

a. pulpwood and woodchips;
b. sand, gravel and stone;
c. intrastate traffic, except Missouri intrastate traffic; and
d. movements having both origin and destination within the following areas: Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Manitoba, Massachusetts, Michigan, Minnesota, Nebraska, New Brunswick, New Hampshire, New Jersey, New York, Newfoundland, North Dakota, Nova Scotia, Ohio, Ontario, Pennsylvania, Prince Edward Island, Quebec, Rhode Island, South Dakota, Vermont, and Wisconsin.

Elimination of the foregoing movements left 3,021 movements relevant to the traffic study covering possible losses to a merged BN-Frisco. Written instructions for evaluation of the relevant movements were prepared, and initial evaluations were made by field traffic personnel.[4] These initial evaluations were then reviewed by area sales managers, and the final evaluation was made by the assistant vice president-sales.

ICG evaluated each movement to determine the degree, if any, to which diversion by the merged company was possible. If a movement was judged divertible, the evaluator was instructed to assign the percentage of the movement (in increments of 5 percent up to and including 100 percent) that was likely to move over a new route. For percentages of less than 100 percent, the criteria leading to the judgment was specified by the evaluator.

The criteria for determining divertibility are substantially the same as those used by applicants and other carrier parties in these proceedings and need not be repeated.

ICG estimates that its gross revenue loss to the merged company would be $8,672,901. (Actually, ICG points out, the loss would lie between $7,773,627 and $9,572,174. This range was determined through calculation of the standard error at the 95 percent confidence level, i.e., the probability of the actual loss being within the described range is 95 out of 100.)

ICG studied both traffic handled jointly with applicants and traffic *not* handled jointly with BN and Frisco. According to applicants, $1,085,540 out of the total estimate represents ICG's estimate of losses on nonjoint traffic, with the balance ($7,587,361) attributable to joint traffic. ICG does not dispute applicants' breakdown of the joint and nonjoint traffic estimates.

Applicants argue that none of the ICG estimates are valid on nonjoint traffic, and that ICG's estimates on joint traffic are overstated by nearly $1 million. Applicants contend that the total ICG estimate therefore is overstated by about $2 million. In support of these contentions, applicants specifically criticize ICG's diversion evaluation on all nonjoint traffic sample cars and on several joint traffic sample cars. ICG's response is that whether the Commission accepts applicants' estimate or that of ICG (or an amount in between), the financial impact on ICG would be too great to be absorbed.

JOINT TRAFFIC

ICG origin.—With respect to joint traffic, applicants dispute ICG's diversion judgments on 34 sample movements. Fourteen of these movements originated at points served exclusively by ICG. This Commission has consistently recognized that an originating carrier serving consignors exclusively has the greatest influence on the routing of the traffic compared to all other carriers participating in the movements.

[4] If unwritten instructions were issued for a particular movement, they were recorded by the evaluator.

ICG would not lose the 14 movements, because, as applicants point out, the shippers must rely on ICG for car supply, switching, rate adjustment, and car tracing and expediting services.

ICG common origins.—Another five ICG sample disputed movements were originated by ICG at points served in common with other railroads. Two of these movements originated at Memphis and terminated on BN at Chariton, IA. Applicants' argument that ICG would continue to hold the traffic, as the originator and supplier of the cars, ignores the fact that the merged company would be able to provide single-line service for the entire movement. The merged company would be in an extremely good position to solicit this business away from ICG at the origin. The remaining three movements originated on ICG in Louisiana at points served in common with railroads other than applicants. ICG claims that the merged company would be able to short-haul ICG by requiring interchange at Memphis rather than at Centralia (the existing interchange point). Two of the movements terminated on BN, while the third represented a bridge movement over BN with termination on UP. In each of these situations, we conclude that ICG, as the origin carrier, will retain this traffic, especially since the origin points are not served in common with applicants.

We conclude that ICG's estimated revenue loss should be reduced by $460,187 for the traffic represented by the 17 sample movements found nondivertible in the above discussion.

ICG special equipment.—Applicants also dispute ICG estimates of diversion on four sample movements, each of which utilized ICG special equipment. Two of the cars originated on ICG, and the other two moved as overhead traffic on ICG. On the two originated movements, the ICG evaluator claimed that applicants would short haul his railroad. This is extremely unlikely since ICG served the consignor and provided special equipment. On the two overhead movements, it is clear that ICG was inserted in the rouging due to the use of its special equipment. The ICG revenue represented by these four movements is $68,780, and the total diversion estimate made by ICG will be reduced by this amount.

Transit time.—"Faster transit time" was used as a reason for diversion on three sample movements (all ICG bridge movements) disputed by applicants. In each instance, as applicants point out, either time was not a factor, faster routes were already available, or routes involving fewer carriers were available. However, on one movement, transit privileges applied and were effected on BN's portion of the movement. BN was the origin carrier, and the destination was on Santa Fe, which was the owner of the specially equipped boxcar utilized. Thus, ICG was justified in projecting a loss on this movement. As to the other two movements, applicants' argument is well taken. Further, one car originated on ICG at a station served also by L&A, the movement involved privately owned or leased special equipment, and was routed ICG-Chicago-Soo Line-Minneapolis-BN. ICG could have been eliminated from the routing without the merger. The other car also was special equipment, and the routing involved ICG as a bridge carrier over its route between Birmingham and Memphis via Fulton, KY, and the bridge movement by Mopac between Memphis and Kansas City. As applicants point out, the movement could have gone from its Florida origin all the way to Woodlawn on Family Lines, then, BN to destination. The expanded revenue on the latter two cars discussed here totals $63,346, and ICG's estimate of diversion will be reduced further by this amount.

Miscellaneous losses.—Applicants also dispute ICG estimates of losses taken on eight "miscellaneous" kinds of movements. For three of these, applicants contend that the route predicted by ICG was not applicable under existing tariffs. Nevertheless,

there were other routes to which the movements could be diverted. The record does not reveal whether those other routes would change ICG's estimated revenue loss on the three movements, but giving ICG the benefit of the doubt, we conclude that ICG's diversion estimates on the three movements are reasonably accurate.

On two of the miscellaneous sample movements, applicants point out that the ICG evaluator did not know the identity of the consignor and the consignee. The two sample cars moved as bridge traffic over ICG. BN was the originating carrier for one car, and the terminating carrier for the other. We have consistently recognized overhead traffic as being the most susceptible to diversion. However, the absence of consignor and consignee identities, makes an informed diversion judgment nearly impossible. We therefore must find that ICG's diversion estimate should be reduced by $21,795, the expanded gross revenue represented by the two sample cars.

Of the three remaining sample cars in the miscellaneous group, we agree with applicants' criticism of ICG's evaluations. Two of the movements were of lumber, and both of these were reconsigned in transit *after* leaving BN. The third car would be retained by ICG because transit privileges applied on ICG's own lines. The expanded revenue represented by the three sample movements total $112,882.

Special privileges.—Finally, three disputed movements involve transit and stopoff privileges. The privilege was exercised on the ICG, and the proposed merger would not affect the movement. The transit movement was an outbound move wholly on ICG from Chicago to Memphis. The inbound move to Chicago had originated on BN nearly a year earlier. The outbound movement (i.e., the sample movement here) was switched to the ICG by a terminal carrier in Chicago. Contrary to ICG's evaluation that transit time would be reduced by a merged BN-Frisco, the switching movements in Chicago could not be eliminated or materially reduced, and the movement would not be affected by the merger. The revenue on these three sample movements on an expanded basis is $82,744, and ICG's estimate should be reduced by that amount.

NONJOINT TRAFFIC

Shipper allocation.—Applicants dispute all of ICG's estimates of diversion on nonjoint traffic. Specifically these estimates are based on 31 sample movements. Seven of these movements involved the same shipper and moved from a point in Michigan to Memphis. The shipper has a traffic allocation policy and transit privileges apply at Memphis. Applicants concede that if Frisco had been included in the routing as the terminating carrier the movements would indeed be divertible, but in these seven movements, ICG would retain its allocated share of the business. We agree with applicants.

Transit.—Two movements originating in Indiana moved over ICG to Kansas City, where Katy received them for termination on its lines. Transit privileges were exercised on ICG. Therefore, we find the two movements not divertible.

Other carriers' equipment.—Four sample movements involved shipments of lumber and plywood. In each instance, the origin point was served by BN or a BN subsidiary in common with the originating carrier. The originating carriers (UP, SP, MILW, and Soo Line) each supplied the equipment, resulting in the elimination of BN or its subsidiary as the originating carrier. In each of the four movements ICG was either a bridge carrier or the terminating carrier. The provision of equipment for lumber shippers is of great importance, and we find that the four sample movements would not be affected by the proposed merger.

Unknown consignor and consignee.—On two sample movements ICG evaluators did not know the identity of the consignors and consignees. Both movements were overhead to ICG, and we recognize the difficulty that an intermediate road has in obtaining consignor and consignee data since the intermediate carrier usually has only partial waybill information available on an "interline abstract." However, in many instances the data can be obtained from the terminating carrier. The record does not disclose whether or not ICG attempted to obtain the data on these two movements (or the two movements in the "miscellaneous" group discussed earlier). As applicants point out, the lack of consignor and consignee identity precludes knowledge of routing policies and the physical facilities at origin and destination. Thus, when these factors (which have a direct bearing on potential divertibility) are unknown, no finding of divertibility can be made. We must conclude that no diversion should be taken on the two sample movements.

ICG local service and special equipment.—Of the 31 disputed movements of nonjoint traffic, 2 were shipments moving locally on ICG, one from Markham (Chicago) to Memphis, the other from Mobile to Chicago. Although the merger would create single-line service competitive to ICG's, both movements took place in specially equipped ICG boxcars. ICG judged 50-percent diversion on the Mobile-Chicago car, and 100 percent on the other. Open or reciprocal switching was involved at both origin and destination for both cars. Switching was provided by Frisco at Memphis, the destination of one car. Bearing in mind that two other carriers, Mopac and L&N, have single-line routes between Memphis and Chicago, and L&N also between Mobile and Chicago, it is clear that ICG's provision of special equipment secured both hauls to ICG local service. The proposed merger would not alter the routings.

Transit time.—Three sample movements in shipper-leased tank cars originated on ICG at open stations. In each case, ICG was given its longest possible haul. We note that two of the movements went directly from Mobile to Chicago via ICG, thence C&O to destinations in Michigan. The third tank car movement was deliberately routed ICG from Omaha to Birmingham, thence SCL to destination. The ICG portion of the haul had to move east over ICG's Omaha-Chicago line into Illinois and south through Fulton to Birmingham.

Another sample originated at Memphis (ICG open station) and terminated at Des Moines, an open station on the Milwaukee. This shipment involved paper products in a plain boxcar. ICG's evaluator claimed that a merged BN-Frisco would provide faster service from origin to destination as opposed to the present routing (ICG-Louisville-MILW-Des Moines). It should be noted, however, that the actual routing was deliberately circuituous (ICG took the car north from Memphis, thence east to Louisville, where Milwaukee Road then took it west to Des Moines).

It is clear that (contrary to ICG's evaluations) faster transit time would not be a sufficient factor to divert these four movements to the merged company. Further, in the case of the three tank car movements, the fact that the equipment was leased by the shippers is of no practical consequence—very few tank cars are owned by railroads, particularly those equipped to handle, as here, foodstuffs or liquid chemicals.

Purposeful exclusion of BN.—A movement of canned goods in a BN specially equipped boxcar moved from a CNW origin served in common with BN to ICG for termination at Memphis. The record discloses that the consignee in 1976 was located on ICG but is now on Frisco. We must consider the movement, however, under the conditions existing in 1976, because we are here determining the competitive impact

of the proposed transaction isolated as much as possible from other intervening factors. In 1976, this movement, despite the fact that a BN car was utilized, was routed CNW-ICG. Obviously, both carriers were intentionally put in the routing to the exclusion of BN, and the car would not be divertible.

Equipment pool.—A special boxcar loaded with auto parts originated by GTW was interchanged to ICG at Chicago and terminated at Memphis. The boxcar was owned by DTSL and was assigned to a GTW-ICG pool. We believe these factors outweigh the fact that Frisco performed switching service for ICG at Memphis, and such movements will be retained by ICG.

Special privileges.—A piggyback movement of tires originated by ICG at Memphis was routed to Cedar Rapids, thence via Rock Island to Des Moines. This movement involved a stopoff privilege, which will retain the traffic for the ICG. Similarly, a shipment of flour, moving in overhead service on ICG, involved transit privilege. This movement originated at a station (Winona, MN) which, according to the ICG evaluation sheet, is also served by Milwaukee Road and Rock Island. "The Official Railway Guide" shows the station to be served additionally by BN and GB&W. The movement took place in a BN special boxcar, and the reason stated for diversion was "faster transit time," with the new route being BN-Frisco to Birmingham, SCL to Miami. The actual route utilized was CNW-East St. Louis-ICG-Montgomery-SCL. It is apparent that the movement, in a BN special boxcar, from an origin served by BN, and subject to transit privileges, would not be divertible because ICG was deliberately placed in the routing.

Service at origin and destination.—Two movements, one of plasterboard, the other of paper products, were judged by ICG to be 30-percent divertible. ICG clearly was given a long haul on the plasterboard movement, which terminated in Jackson, MS, a point served exclusively by ICG. The paper products movement originated at Green Bay on the CNW. This point is also served by GB&W and Milwaukee Road. CNW turned the car over to ICG at Madison, IL, and ICG handled the movement to MBR at Meridian, MS. ICG's evaluation states that the new route would be GB&W-BN-MBR. Considering that the shipment took place in a specially equipped car and that CNW originated the car at a point not served by BN, it is not likely that the sample movement would be even partially diverted. In fact, since CNW, Milwaukee, Road, and GB&W all serve the origin, any split of the traffic between the three carriers would already be taking place, and the proposed merger would not affect the situation.

ICG origin or termination.—Of the remaining four disputed ICG sample movement evaluations, the shipments either originated or terminated on ICG. Single-line service was already available for at least two of the shipments (one originated on ICG, the other terminated on ICG). A third movement was U.S. Government TOFC traffic originated on ICG, which obtained a long haul from Peoria to Birmingham, and the fourth was routed by the consignee with a long haul to destination by ICG. These four movements would not be diverted.

The 31 nonjoint sample movements disputed by applicants and found not to be divertible represent traffic with (expanded) gross revenue of $1,085,540, and ICG's diversion estimate will be reduced by that amount.

SUMMARY

In total, we conclude that ICG's estimate of $8,672,901 in diversion should be approximately $6.8 million. This reflects a reduction of $1,085,540 on nonjoint traffic, and $809,734 on joint traffic which will be retained by ICG.

The $6.8 million we have found is somewhat higher than applicants' estimate of $6.6 million. Since we view applicants' estimates as the absolute minimum, it is reasonable to conclude that ICG's losses will more than likely lie in the range delineated by $6.6 million as the minimum and $6.8 million as the maximum.

TRACKAGE RIGHTS STUDY

The ICG traffic study in support of its trackage rights request utilized 1 ICG subsample, as opposed to the 15 subsamples utilized in the traffic loss study.

By a Commission decision served July 25, 1978, ICG was ordered to study BN and Frisco traffic in which ICG did not participate to determine how much, if any, of that traffic could be gained as a result of the proposed trackage rights. A computer tape containing the involved traffic was supplied by applicants, along with a computer printout of Frisco "noninvolved" traffic.

Movements from applicants' samples selected by ICG for further study were limited to the shipments which:

a. originated at Birmingham or in the Birmingham terminal area;
b. originated or terminated at Holly Springs, New Albany or Tupelo; or
c. moved between Memphis and Birmingham.

ICG excluded shipments moving over Frisco lines west of Memphis, even though the shipments also moved between Memphis and Birmingham. It concluded that traffic of this kind could not be diverted from the merged company.

Based on the two studies, ICG estimates that it would gain a total of $4,017,967 in gross freight revenue from the proposed trackage rights operation. Of this amount, $2,329,571 would be gained by extending the length of haul on traffic presently handled by ICG, and the remaining $1,688,396 would be gained by attracting traffic not presently handled by ICG.

ICG's estimate of a $4,017,967 gain from the trackage rights condition would offset its estimated traffic loss ($8,672,901) by about 46 percent. Based on our estimate of ICG's traffic loss ($6.8 million), 59 percent would be offset by the trackage rights. We will accept this as the maximum gross revenue ICG could hope to gain from this condition.

KATY TRAFFIC STUDY

Katy prepared a traffic study to estimate its losses to the merged company. It sampled all movements via Katy for 1976, that is, not only traffic handled in conjunction with applicants, but also local Katy traffic as well as cars interchanged with railroads other than the applicants. The latter two classes of traffic are included because Katy believes they are potentially as divertible as traffic interchanged with the applicants.

Katy desired to estimate the revenue loss using no more than 4,000 documents from its data bank, with an accuracy of an interval estimate within $750,000 to $1 million with 95-percent confidence. A stratified random sample was chosed to accomplish these goals. Traffic was separated into 21 separate strata based on the type of commodities transported and whether or not a BN-Frisco interchange was involved. The sample sizes per strata were computed statistically, with a total sample size of 3,475 cars.

No criticism was made of Katy's sampling methodology, and our examination of the study shows that the sample was drawn in accordance with sound probability sampling procedures.

Katy's vice president-operations and vice president-traffic evaluated each movement using computer printouts, waybills, abstracts, and information on industry location, applicable rates and routes, whether an industry was served by reciprocal switching, and any other supplemental information deemed necessary. In making their judgments as to divertibility, the evaluators considered:

Single-line service;
Single-line service to destination junction;
Single-line service from origin junction;
Single-line service via best service junction;
Single-line transit;
Short haul; and
Equipment

Katy considered as most significant the factors of single-line service with its faster transit time and single-line service to and from the junction points. No diversions were estimated unless both evaluators agreed.

Katy in no instance viewed a movement as 100-percent divertible; it felt there could always be a slight possibility of retention. Katy assessed what would otherwise be wholly divertible movements as 95-percent divertible. A 50-percent factor was used where diversion would occur, but because of the particular characteristics and location of the industry (such as reciprocal switching, joint switching, and relative influence with the industry), the diversion would not be total. A 25-percent factor was used in movements which were highly susceptible to equipment supply, and some substantial diversion would occur.

Katy found that 794 movements out of its 3,475-car sample were divertible. Expansion to 100-percent yielded 20,255 movements which would be lost to the merged company, for an estimated annual Katy revenue loss of $11,540,277. The true value of this estimate has a 95-percent chance of being covered by the interval $10,648,547 to $12,496,569. With respect to the $11,540,277 revenue loss, $6,768,970 is on traffic handled by Katy in conjunction with BN, Frisco, FW&D, or C&S (out of a total of $13,140,208 of revenue received by Katy on such traffic). The balance of the loss ($4,771,299) relates to Katy traffic which is handled in conjunction with other lines or is local traffic. Katy expects that at least 65 percent of the diversion loss will occur in the first year following the merger, and the remainder will occur in the second year.

Katy losses in revenue by class of traffic are presented below.

Class of traffic—1976	*Revenue*
Interline forwarded	$1,695,067
Interline received	6,550,686
Overhead	1,805,141
Local	1,489,383
Total	11,540,277

Applicants argue that the gross revenue loss estimated by Katy is overstated by $6,544,610. According to the applicants, one overriding error permeates the Katy traffic study. That is, the decision of Katy's traffic evaluators to find diversion on every car for which some form of additional single-line service would become available after merger. In other words, the availability of single-line service became an absolute, unvarying reason to justify a claimed diversion, despite all other factors (i.e., location of consignor and consignee, car supply, allocation policies, et cetera). Applicants point out that Katy took diversions on 135 movements where alternate single-line service, equivalent to that projected for the merged company, was already available in 1976. In addition, applicants contend that Katy disregarded the fact that some of the diverted traffic moved in Katy equipment and/or was switched by Katy at origin or destination.

Of the $11,540,277 gross revenue loss projected by Katy, $6,768,978 was developed from traffic interchanged jointly with one of the applicants. In comparison, the applicants estimated that they would divert revenues amounting to $6,531,180 from Katy on traffic jointly interchanged. These estimates are within 3.5 percent of each other, which leads to the conclusion that Katy will probably lose gross revenue within the $6.5 to $6.8 million range on traffic interchanged with the applicants.

The remaining gross revenue loss of $4,771,299 was projected on traffic which was not handled by the applicants. Of this amount, $1,489,383 was associated with traffic which was local to Katy and $3,281,916 with traffic interchanged with carriers other than the applicants. This traffic (i.e., traffic not handled jointly with the applicants) was dealt with extensively in the record and on brief.

With respect to local traffic, applicants claim this traffic will not be diverted because Katy provided the equipment, served the origin and destination facilities, and performed the entire line haul. For discussion purposes, this local traffic is divided into three groups, local, local (TOFC) and local (transit) movements.

Katy local traffic.—The local group is made up of 40 sample movements accounting for revenues of $522,350. Nineteen of these movements (accounting for revenues of $175,486) were switched at the origin by Katy and were moved single-line by Katy to the destination. As the originating and single line-haul carrier, Katy has the maximum influence and will be able to retain this traffic. Four of the 40 local sample movements (with expanded revenue of $22,099) were switched to Katy at the origin by a terminal switching carrier and moved single-line to a facility served by Katy at the destination. We conclude that Katy will not lose this traffic because, as the line-haul railroad serving the destination facility, Katy will have enough influence to continue the present routing.

Three of the 40 movements (representing expanded revenues of $73,592) were switched to Katy at the origin by terminal lines and moved via Katy to the destination, where two were switched by terminal lines and one by UP. Katy's reason for the possible diversion of these sample movements was new single-line service by the applicants. Mopac presently provides alternate single-line service equivalent to that projected for the applicants between the origins and destinations of these shipments. Since the shippers already had an optional single-line service available but chose to route via Katy, we do not believe that an additional single-line route will have any effect on the present routing.

Six of the 40 sample cars (representing $80,886 in revenues) moved between Kansas City and Dallas. Five of these shipments were transported in Katy-assigned special equipment and one moved in Santa Fe equipment where Katy and Santa Fe contribute to the equipment pool. CPC International was the consignor in all six of the shipments

and is served at Kansas City by BN, N&W, and Mopac and at Dallas by Katy, FW&D, and SSW. The reason given by Katy for taking diversion on these six sample cars was single-line service and equipment. There are several railroads that presently provide single-line service between Kansas City and Dallas. The industries involved are all open to switching and could route this traffic over other single-line routes, including Frisco. Katy has special equipment assigned to the service of this shipper and should be able to continue this practice. The proposed merger will not influence the routing of this traffic. Thus, we find that of the 40 sample movements contained in the local traffic group, 32 will not be rerouted. Katy has overstated its diversion exposure in this local traffic group by at least $352,063.

Katy local (TOFC) traffic.—The local (TOFC) traffic group consists of 24 TOFC sample movements, with expanded revenues of $217,911. Katy believes that these movements may be divertible because of the establishment of a new single-line service and equipment. Of the 24 TOFC sample cars, 17 moved between Kansas City and Houston, 5 moved between St. Louis and Houston, 1 car originated at Houston and terminated at Oklahoma City, while the remaining car originated at Houston and terminated at Tulsa. Katy provided trailer equipment for 15 of the 24 TOFC movements. Between each mentioned city pair, there presently exist two or three single-line routes via railroads other than Katy which have loading ramps at both the origins and destinations. Even though these other railroads could have provided the service, Katy has been able to garner this traffic. The establishment of an additional single-line route by applicants will not affect the present routing of this traffic. We find that Katy will not lose this TOFC traffic.

Katy local (transit) traffic.—The local (transit) traffic group is composed of 26 sample movements with projected revenues of $749,122. In each case these movements involved an outbound movement from a transit point where the inbound movement was handled by an applicant line. Katy initially included these sample movements in its study with the traffic it jointly interchanged with the applicants. However, applicants argued that these were really local movements, physically moving solely in Katy service. Katy has accepted this reclassification. Eleven of the 26 sample movement (representing $309,912 in expanded revenue) were switched at the transit point by Katy and were transported single line by Katy to the destination. Katy provided the equipment for all 11 movements and on 2 Katy also performed the switching at destination. It is obvious that Katy has the maximum influence over the routing and will not lose this traffic to the merged company.

Four of the 26 sample movements (with expanded revenues of $173,903) were switched by Katy at their origin and will not be diverted to the merged company.

Another four (with expanded revenues of $173,903) were switched by Katy at their destination points in Dallas and Houston. Three of the movements were in equipment provided by Katy, while the other movement was in a Rock Island car where Katy participated in the equipment pool. BN and KCS can perform the switching service at the Kansas City transit point on two of the four sample shipments, while KCT or Frisco can provide the switching service at the transit point in Kansas City on one of the movements. Rock Island provides the switching service for the other sample movement, at the transit point in Dallas. Katy is assured of participation in these four sample movements because it performs the switching service for the receiver and furnishes the equipment.

Another 3 of the 26 sample movements (accounting for revenues of $60,248) were switched by Katy at their destinations in Denison and Dallas, TX. This traffic moved in equipment furnished by companies other than applicants or Katy and was switched

to Katy at a transit point in St. Louis by a terminal switching carrier. We conclude that Katy will continue to participate in this traffic because, as the line-haul railroad serving the destination facility, Katy will have enough influence to preserve the present routing.

Two of the 26 sample movements (representing revenues of $94,413) were switched by UP to Katy at a Kansas City transit point and transported in Katy special equipment to a Houston destination, where a terminal carrier performed the switching service. The transit point and the terminating point are both open to switching by several carriers including Mopac. This traffic could have been handled single-line by Mopac. However, the two sample shipments moved over Katy primarily because of Katy's special equipment. We believe that Katy will be able to continue to provide this special equipment and that the establishment of an additional single-line route will not affect the present routing of this traffic.

Finally, 1 of the 26 sample movements (with expanded revenues of $20,867) was switched by BN to Katy at the transit point and moved to a Mopac switching facility, open to all carriers, in St. Louis. BN could have handled this movement single line today, as could Frisco. We conclude that this suspected loss by Katy is not related to the proposed merger and we will disallow it.

We conclude that 21 of the 26 sample movements included in the local (transit) traffic group will not be diverted. Katy has overestimated its diversion loss on local (transit) traffic by $659,343.

INTERCHANGE WITH OTHER RAILROADS

With respect to the traffic interchanged with railroads other than the applicants, Katy projects a loss of $3,281,916. Applicants disputed $2,031,512 of the revenue loss, estimated from 117 sample movements. For discussion purposes, these will be treated in four separate groups.

Group 1.—The first group consists of 89 sample movements, accounting for expanded revenues of $1,385,836. The majority (64) were between Texas and the Midwest, with 20 between Texas and eastern points via the Chicago and St. Louis gateways. Fifty-seven were from origins or to destinations served by either BN or terminal switch lines, and 9 were TOFC movements. Almost all of these movements had origin or destination at Houston, Texas City, or Dallas, points which BN cannot serve now by direct routes, but will be able to serve after merger. Katy believes that it will lose this traffic to the new single-line service.

Applicants contend that in all 89 instances, single-line service existed in 1976 but was not used by the shipper. Therefore, reliance on postmerger single-line service as an overriding diversion factor is inappropriate. Since applicants did not participate in these movements in 1976, they do not expect to after the merger.

Nine of this group originated on CNW at either Cudahy, WI, South Chicago, IL, or Proviso, IL and were routed CNW-Kansas City-Katy-Houston. CNW switched the origin for all nine sample cars, and Katy switched the destination for eight of the nine cars, while SP switched the other car. Katy provided the equipment in eight of the nine movements while CNW provided the other car. Six of the eight cars provided by Katy were assigned to car pools. It is obvious that CNW and Katy will cooperate fully to continue their friendly connection at Kansas City and preserve their traffic. As the carriers switching the origin and destination points as well as providing the equipment, they can exert enough influence to continue the present routing. We find

that Katy has overstated its diversion by the $139,237 derived from these nine movements.

Fifteen movements originated on N&W at Chicago and Birmingham, MO, and were routed N&W-Kansas City-Katy-Houston. N&W switched the origin facilities, while a terminal switching railroad switched the Houston destination. These shipments were assembled motor vehicles originating at Ford Motor Co. plants. This traffic moves in special equipment assigned to a pool for Ford Motor Co. Twelve were in Trailer Train cars, 2 in ATSF cars, and 1 in an N&W car. It is apparent that equipment was not a routing factor because these movements were in assigned equipment pools. Several other railroads including Mopac and ATSF presently provide single-line service between Kansas City and Houston. There is no reason to believe that an additional single-line route will affect the present routing. We conclude that Katy will continue to handle these cars and thus, has overstated its revenue loss by $91,420.

Five cars terminated at facilities switched by Katy in Dallas and Houston. All five originated on IHB in the Chicago area (two at Blue Island, two at Argo and one at South Chicago). Two were transported CNW-Kansas City-Katy-Dallas, while the other three were routed MILW-Kansas City-Katy-Houston. Had single-line service been a criterion, they would have moved directly from Chicago to Houston and Dallas via either ATSF or Mopac in 1976. As the terminating carrier which switches the destination points, Katy has enough influence on these movements to continue to participate. We find that Katy has overestimated its diversion on this traffic by $41,056.

Five movements originated on Milwaukee Road at Chicago, St. Paul, MN, and mid-Amana, IA. Three of them terminated at a facility served by Katy in Garland, TX, while the other two terminated at a facility served by SP in Houston. All five were routed MILW-Kansas City-Katy. Milwaukee Road provided the equipment in all but one case. As the carrier which switches and serves the origin facilities and provides almost all of the equipment, Milwaukee Road will have considerable influence over the routing of this traffic. Katy, as the terminating carrier on all five and destination switching road for three, will also influence routing. It is obvious that Katy and Milwaukee Road will cooperate to continue their friendly connection at Kansas City and preserve this traffic. We find that Katy will not lose the $59,330 revenue associated with these five sample cars.

Nine of the 89 sample cars were TOFC movements. Seven of these originated in Chicago on ICG and moved via Kansas City for connection with Katy. Five of these seven terminated their rail movements on ramps in Dallas, while the other two terminated in Houston. The remaining two movements, destined for Houston, originated in Ohio on CR and B&O and moved via St. Louis for connection with Katy. It appears that single-line service is not the overriding factor in the movement of these nine TOFC cars. Santa Fe and Mopac both have loading ramps at the origin and destinations and presently provide single-line service between Chicago and Dallas or Houston. Between St. Louis and Houston, SP and Mopac operate single-line routes. All of this TOFC traffic could have been handled by these carriers if single-line service was required. We conclude that applicants' new single-line service will not affect the routing and that Katy will not lose the $77,249 in revenue attributed to this traffic.

Eight movements were received by Katy at either Kansas City or St. Louis and moved single-line to terminating facilities which were switched by Katy at Dallas, Houston, and Tulsa. Another movement originated at a point switched by Katy in Garland, TX and moved through the Kansas City gateway. For all nine movements,

single-line service is already available from other carriers, such as ATSF, Mopac, KCS and SP. Therefore, an additional single-line route by the applicants would not be a routing factor. In addition, Katy has considerable influence over the routing because of the switching service it provides. We conclude that Katy will not lose the $122,560 associated with these nine sample cars.

Twenty-six movements originated or terminated at Houston or Texas City. Switching services were performed by carriers other than Katy or the applicant lines. Thirteen of these 26 cars were routed via the St. Louis gateway. Alternative single-line service is already available via Mopac or SSW for this traffic. Four of the 26 sample movements moved via the Kansas City gateway. Again, alternative single-line service was available to the shippers in 1976 via Mopac, ATSF or SSW. Six of the 26 sample cars originated near Chicago and moved via CNW or ICG to the gateways of Kansas City or St. Louis for interchange with Katy. Mopac and ATSF can provide single-line service over those routes today. Three of the 26 sample movements originated at Sand Springs, OK and were routed SS-Home Junction-Katy-Houston. Katy believes that after the merger these three cars will move SS-Tulsa-BN-Houston, even though in 1976 Mopac and ATSF could have provided this route. For all 26 sample movements, alternative single-line service existed via two or three other carriers in 1976, but was not utilized by the shippers. Applicants' additional route is not likely to affect the routing. In addition, Katy must have some influence over this traffic to be participating in it. In our opinion, Katy will not lose the $432,060 attributable to these 26 sample shipments.

Three movements originated in Illinois or Nebraska and moved via the Kansas City gateway for connection with Katy. Neither Katy nor the applicants participated in the switching services for these cars. Two originated in the Chicago area and terminated at Dallas or Tulsa. Either ATSF or Mopac could have provided single-line service for these two shipments. The other sample car originated at Omaha on Mopac, which performed the switching, and terminated at Oklahoma City. RI presently provides the only single-line service between Omaha and Oklahoma City. However, we do not believe that single-line service is a factor in this movement. Mopac switched the consignor and performed the line haul to Kansas City for connection with Katy. Thus, Mopac has considerable influence over the routing of this traffic. To continue its friendly connection with Katy at Kansas City, we believe that Mopac will preserve the present routing. We find that Katy will continue to participate in these three sample movements and will not incur the revenue loss of $84,161.

One originated at Burns Harbor, IN, and was routed CSS-Chicago-CEI-St. Louis-Katy-Home Junction-SS to Sand Springs, OK. The switching serviges were performed by the originating and terminating carriers. After merger, Katy anticipates that this sample car will be diverted to a CSS-Chicago-BN-Tulsa-SS route because the applicants will be able to provide single-line service from Chicago to Tulsa. It appears that single-line service between these points is not an element in the routing because ATSF already provides that service. We find that Katy will retain the $4,569 attributable to this sample car.

Summarizing our findings with regard to the 89 sample movements in this first group, we conclude that 82 will not be rerouted and that Katy has overstated its revenue loss by $1,051,642.

Group 2—equipment.—The second group of sample movements consists of seven sample cars accounting for expanded revenues of $302,183. All seven shipments moved in Katy equipment and are considered nondivertible by the applicants for that reason. Katy argues that because it used a percentage of diversion it gave appropriate

effect to that fact as well as the fact that Katy originated some of this traffic. Three of the seven shipments, with expanded revenues of $224,770, originated on Katy at Military, KS, and moved Katy-Kansas City-UP to a Council Bluffs destination. Katy and UP provided the switching services at the origin and destination facilities. Katy's reason for diversion is that the merged system will be able to provide a new single-line service. Katy has overlooked the influence that UP, as the terminating and switching carrier, has over the present routing. UP and Katy can work together to keep this traffic on their joint-line route. None of the applicants' lines was involved in these movements. We believe that Katy as the originating carrier, and UP as the terminating carrier, will be able to exert enough influence to preserve the present routing of these three sample cars. We find that Katy will continue to participate in this traffic and will not lose the $224,770 associated with the three sample movements.

Group 3—switching.—The third group of sample movements involve four shipments received by Katy at either Kansas City or St. Louis and delivered to Texas destinations where Katy provided the switching. Katy claims that the applicants' single-line service will divert this traffic. Two of the four movements terminated at consignees captive to Katy in Houston and Wichita Falls, with Katy receiving its longest haul. It is obvious that Katy has considerable influence over these two movements and should be able to continue in the present routing.

One car originated on CR at Economy, PA, and moved CR-St. Louis-Katy to Wichita Falls. Katy believes that the applicants will be substituted for it in the routing. We disagree. Katy has some influence over this movement since it is the switching and terminating carrier. In addition, it will be in CR's best interest to exercise neutrality in the routing and maintain its present routing pattern.

Another movement was a shipment from Quaker Oats, Rockford, IL to Safeway Stores, Garland, TX, routed MILW-Kansas City-Katy. The origin plant is switched every third year by BN, ICG, and Milwaukee Road. The evidence shows that the switching carrier gets a heavy proportion of outbound business during the year it switches (about 68 percent). However, this outbound business evens out to about one-third over a 3-year period. Milwaukee Road performed the switching for this sample car and received its longest haul. Milwaukee Road and Katy are obliged to work together to withstand the strength of the merged company. Since the applicants did not switch the origin in 1976 and because Katy was the switching and terminating carrier, the present routing will be maintained.

Katy will continue to participate in these four sample movements and will retain the $106,706 related to this traffic.

Group 4.—The last group of sample movements consists of 17 sample cars, representing expanded revenues of $236,787. Ten shipments were overhead to Katy, 5 were TOFC, and the other 2 were received by Katy. In each case, Katy believes that new single-line service by the applicants will divert the traffic.

One car in this group, worth $69,000 (expanded), was a shipment of wheat from an industry switched by CNW at Superior, WI to Houston, routed CNW-Kansas City-Katy. This shipment moved in equipment owned by CNW. As the originating carrier using its own equipment CNW will be able to exert enough influence over this movement to preserve the present routing. With their friendly connection at Kansas City, CNW and Katy can work together to neutralize the power of the merged company. We conclude that Katy will continue to participate in this movement.

Four of the movements, with expanded revenues of $18,876, involved lumber shipments Washington to Texas and Louisiana points. UP was the originating and switching carrier (except for one car which was barged to a connection with UP).

These four shipments were all routed in UP equipment to a connection with Katy at Kansas City. Katy claims that both UP and Katy will be replaced in the routing by the merged company. It is clear that the present routing of this traffic, which gives UP its longest haul, is primarily the result of the equipment and service provided by UP. In our opinion, the consignors will continue to specify this routing pattern and Katy will continue to participate in these four movements.

Thus, we find that Katy will continue to handle 5 of the 17 sample movements with expanded revenues of $87,876.

In sum, Katy's diversion estimate of $4.8 million in traffic which was not handled by applicants, appears to be overstated by $2.7 million. The difference, $2.1 million, represents the revenue diversion that Katy may experience on nonjoint traffic. Since Katy will probably lose $6.5 to $6.8 million on traffic jointly interchanged with applicants, we conclude that the maximum gross revenue loss which Katy may encounter as a result of this merger is $8.9 million, rather than the $11.5 million estimated by the protestant.

MILWAUKEE ROAD'S TRAFFIC STUDIES

Milwaukee Road prepared traffic studies based on 1976 operations to determine the amount of diversion to be expected from a merged BN-Frisco. These studies implicitly assumed continuing operations of the Milwaukee Road system as it was constituted in 1976, and on that basis, it was estimated that Milwaukee Road would lose $5.8 million in gross revenue from immediate diversion of traffic to a merged BN-Frisco. In addition, Milwaukee Road asserts that its traffic studies show that $8.3 million in gross revenue is "vulnerable" to diversion as the merged company matures and is able to develop the advantages resulting from the merger (Milwaukee Road refers to this longer-term diversion as the "synergistic effect" of the proposed merger). Milwaukee Road's service will deteriorate correspondingly.

In its reply brief filed September 17, 1979, Milwaukee Road attempted to quantify the impact of the proposed BN-Frisco merger on the core system proposed in its trustee's reorganization plan. To do this, Milwaukee Road simply extracted the sample movements from its 1976 traffic study which represented traffic originating or terminating on the core system or which moved in overhead service over the core system. The sample revenue for these movements was then expanded. Milwaukee thus claims that a merged BN-Frisco would divert $3.0 million in gross revenue from the core system and that over $3.4 million would be "vulnerable" to long-term diversion.

Since the reply brief is the first and only document on the record in which diversion from a hypothetical core Milwaukee Road has been alleged, there has been no opportunity for any party to test the validity of the assumptions or estimates through cross-examination of witnesses or other means. The record is thus devoid of probative evidence concerning the competitive strength, operation, manpower, equipment, applicable routes and rates, or other facets of the trustee's proposed reorganized entity. More importantly, the relevance and validity of the truncated "traffic study" is questionable. The 1976 study from which the truncated study was extracted was done on the basis of operations conducted by a Milwaukee Road as it was physically constituted in that year, not as proposed in a recommended plan of reorganization. Clearly, the evaluations of divertibility on each sample movement reflect the 1976 composition of Milwaukee Road.

We must conclude that Milwaukee Road's full 1976 traffic study is not representative due to overriding events which have occurred since Milwaukee Road

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became a party to these proceedings. The truncated version is without merit, validity, and relevance, and is entitled to no weight.

Although we traditionally use a traffic analysis of past trends to project future trends, we cannot ignore intervening events which drastically change, or even eliminate, operations, traffic patterns, car supply, termini, and the general configuration of the railroad.

In this case, these events would render Milwaukee Road's "vulnerable category" absolutely valueless even were we to consider the traffic study. Loss of traffic in the "vulnerable category" clearly is related to Milwaukee Road's deterioration, instead of growing strength of the merged company.

ROCK ISLAND'S TRAFFIC STUDIES

Rock Island prepared an "add-on" traffic study in support of its position as a protestant. Briefly, Rock Island first adopted applicants' traffic studies as they relate to traffic handled jointly with Rock Island. To this base, Rock Island added the results of its own study of traffic not handled jointly with applicants. The combined estimates of both studies, totaling $6.6 million, are based on Rock Island's operations in 1976.

Rock Island, as the operating railroad which produced these traffic studies, no longer exists. Its traffic studies are no longer relevant to these proceedings because it has ceased operations and the assumptions underlying the study are no longer valid.

APPENDIX I

Cost analysis

APPLICANTS' DIRECT EVIDENCE

Applicants conducted a study of economic benefits arising from implementation of their operating plan. Offsetting these savings are costs associated with arrangements made for the protection of dislocated employees of the merging railroads. The net amount was derived from combining the results of individual studies of separate functions, as described below.

Net operating savings.—Not all of the common points presently served by the applicants were believed to be potentially capable of generating savings through consolidation. For example, no savings were foreseen at Fort Worth, Irving, Dallas, and Quanah, TX. Major savings are projected, however, at both the St. Louis and Kansas City gateways.

At St. Louis the merged system will handle 217 additional cars daily, but 262 fewer cars will require switching. Simplified handling will result from operation of two daily run-through trains, as well as reduction in cars interchanged with other railroads and between merger applicants. Most road trains will originate and terminate at the Frisco Lindenwood Yard, with BN's North St. Louis Yard downgraded in importance.

At Kansas City an average of 20 daily trains currently arrive and depart at the BN Murray Yard. Frisco's 19th Street Yard handles an average of eight inbound daily trains, and its Rosedale Yard an average of eight outbound daily trains. After merger six additional trains will arrive and depart Kansas City daily. An additional 839 cars will be handled daily, with 294 fewer cars interchanged with connecting lines and 139 fewer cars interchanged between applicants. The 19th Street Yard will be converted

to a limited use satellite facility, with the major yard work of the merged company handled at Murray and Rosedale. Four fewer switch engine shifts and one fewer switch engine unit will be operated.

Applicants' general plan for managerial control of the merged company requires conversion of the Frisco lines into a sixth BN operating region, with headquarters in Springfield, MO. Realignment of positions is contemplated in the mechanical, maintenance of way, communications and signals, special services, and operations planning and transportation services departments. The changes at St., Louis and Kansas City are included in the savings calculated for those two points. The only other impact of the realignment will be an additional position of assistant superintendent-transportation at Memphis, TN.

At present both BN and Frisco operate information data systems. A joint team ascertained that the BN system (COMPASS) can adequately absorb the Frisco system (MICS) more readily than the reverse because of relative capacities for expansion. Conversion of MICS to COMPASS will require a temporary transfer of data between the two systems with present staff personnel, and simultaneous programming, training, installation, and testing for permanent operation.

A completely automatic dial telephone system will be installed to connect the existing separate networks, requiring an additional switching facility at Mendota, IL. The combined system will permit elimination of 91 Bell terminals now in service at Chicago, with adequate capacity to serve the major operating facility at Springfield, MO, through 24 leased circuits. Other improvements will be made to PBX boards at St. Louis and Kansas City.

Additional data transmission circuits are planned for the extension of COMPASS to present Frisco lines, including both leased lines and microwave channels. A teletype and data line will be installed to connect the merged company's Springfield office with corporate headquarters in St. Paul, MN. Finally, the company's general purpose computer system line capacity will be augmented.

Consolidation of marketing offices presently located in Tulsa, OK, Memphis, TN, and Birmingham and Mobile, AL permits acquisition of teletype machines to supplant less desirable leased facilities. Additionally, modern data terminals will replace Western Union telex machines at 10 other marketing offices. Long-distance telephone tolls and Western Union charges are expected to be reduced.

The merged company would connect dispatchers' circuits at St. Louis and Kansas City.

Present radio equipment is not interchangeable or frequency-compatible. Acquisition of radio power boards and crystals and modification of cabooses is required.

Modifications will be made to 289 Frisco road and 142 Frisco switch locomotives to enable the pooling of locomotive power to maximize fleet utilization. These modifications include installation of mechanical drinking water coolers and fuel heaters and fittings, as well as painting with BN colors. Stationary fueling hydrants will be installed at 101 locations.

Because of more restrictive labor agreements and statutes prevailing on BN lines, 117 Frisco cabooses must be modified. These mocifications include marker lights, mechanical water coolers, electrical chargers, slack adjusters, spotlights, air gauge lights, nonskid floor painting, and ash pans.

Installation of mechanical water coolers will permit savings through termination of leases on ice machines.

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Applicants plan to accelerate maintenance on present Frisco locomotives to bring that company's 18.1-percent out-of-service experience to the 13.1 percent applicable to similar locomotives on BN. In each of the first 3 years 29 Frisco units will undergo class 2 repairs (500,000 miles) and 29 units will undergo class 1 repairs (1 million miles).

Ultimately, however, the merged company's power requirements will be met with 22 fewer locomotives. The calculation of savings is based upon the 1976 cost new of $464,000 for a 2,000 horsepower locomotive, pretax cost of capital of 19 percent, and estimated cost of labor and materials required to maintain these locomotives.

The merged company projects savings from the expansion of output of welded rail at the existing Frisco plant at Springfield, MO by an additional 115 track-miles per year. This addition to capacity will permit delivery of new rail at Birmingham, AL, rather than at Gary, IN, and elimination of Laurel, MT, as a welding location for rail-laying programs in the BN Chicago region.

Automated equipment at BN's Brainerd, MN, car shop can be adapted to handle airbrake shopwork now conducted by Frisco at Springfield. One-half of the savings from 12 positions eliminated can be achieved in year one, with the full amount each year thereafter. However, the cost of acquiring equipment to transport brake valves to Brainerd and the cost of equipping three outlying locations to clean cylinders upon closure of the Springfield facility are offsets to the savings.

Similarly, car dismantling activities moved from Springfield to Brainerd will permit the abolition of two positions.

Outside vendors now performing repairs to locomotive components for Frisco will be eliminated in favor of present BN shops.

Heavy repairs and repairs to wrecked locomotives presently performed at Frisco's Springfield shop will be transferred to BN shops at West Burlington, IA, Livingston, MT, and Hillyard, WA. The remaining locomotive maintenance at Springfield will be made more efficient by installation of movable body supports on the drop table.

Applicants have similar and compatible engineering and roadway maintenance programs. Other than a concentration of rail welding at Springfield, no savings are anticipated from any change in overall policy. However, changed traffic patterns after merger will result in significantly increased volume between Rosedale Yard (Kansas City) and Edward, KS. Within this segment are 27 miles of double track, the second main of which is laid with 112-pound rail and is subject to speed restriction. It will be upgraded to comparability with the first main track of 132-pound rail.

On the Kansas City-Minot route, which entails operations by way of the Missouri River bridge at Sioux City, 14 new four-axle 2,000 horsepower locomotives will be required. Additionally 41 new six-axle 3,000 horsepower locomotives will be required for other routes. Based on the 1976 average cost of new equipment and a 19-percent pretax cost of capital, the annual recurring cost of the 55-locomotive investment is calculated. Similarly, the applicants must acquire 17 cupola-equipped cabooses.

In 1976 applicants claim that approximately 10.9 million car-miles were generated by the return of 19,994 empty BN cars by Frisco and 10,220 empty Frisco cars by BN. It is estimated that reduction in handling cross-haul of empty equipment will produce an annual savings weighted by car type of 5.84 million car-miles.

Improved availability of cars nearer to loading points is estimated to permit 800 fewer cars in the merged company fleet. This estimate was derived by car type, based upon the number of loads which could have been handled by each road of the other road's cars and using an assumed 18-day cycle per car per load. Applicants used 1976

average cost new of freight cars by type, and a 19-percent pretax cost of capital to project the investment cost savings.

Applicants have analyzed seven common items sold on a continuing basis to dealers in the steel scrap market to determine the effect of the merger on obtaining higher prices for scrap. Because of differentials by location, applicants stated that in 1976 they could have sold 77,357 tons of material at higher prices.

Additionally, applicants analyzed 10 common items of material purchased by Frisco in 1976. Based upon BN's purchase of identical items in greater quantity, they estimate that combining material purchases would permit savings amounting to 2 percent of Frisco's expenditure.

Similarly, increasing the quantity of freight cars ordered from commercial car builders would be expected to produce fleet acquisition savings. By increasing 400-car orders to 500 cars, resulting in quotations of $100 and $666 less per car, the projected savings approximate 0.9 percent of Frisco's 1976 expenditures for new freight cars.

Nonlabor overhead expenses were analyzed to determine the net reduction achievable through the merger. The largest single item was insurance premiums, which aggregated 42.1 percent of the total nonlabor savings. The remainder of the total represents 28 separate items.

A joint study was made of economic benefits realizable from combining systemwide labor functions. The major areas of study involved general offices presently located at St. Louis, Springfield, MO, and St. Paul, MN. Based on pay rates by position classification, applicants determined by department the net change in employee compensation which would result. Appropriate payroll additives were also included by adopting standard rates published by the General Managers Association of Chicago. These rates are currently used by both companies.

Applicants determined that no employee should lose existing benefit coverage as a result of the merger. To equalize the benefits available to employees of the merged company regardless of prior road affiliation, both predecessor companies will be included in combined new programs. It was assumed that exempt employees whose jobs were eliminated could be readily absorbed elsewhere within the railroad in view of the flexibility regarding transfer, a 6.2-percent historical attrition rate, and ability to fill half of all exempt position vacancies with displaced personnel. Transfer expense between locations was projected from earlier merger experience, updated to 1976 price levels.

Applicants' estimates of *net* operating savings appear in table 1-1.

TABLE I-1

Calculation of net operating savings (costs) (excludes cost of handling diverted traffic)

Item	Year		
	One	Two	Three
Common point consolidation:			
St. Louis:			
Manpower, including fringe benefits	$2,106,943	$2,106,943	$2,106,943
Switch engine operation and maintenance	149,621	149,621	149,621
Switch engine ownership	14,976	14,976	14,976
Kansas City:			
Manpower, including fringe benefits	1,432,250	1,432,250	1,432,250
Switch engine operation and maintenance	85,498	85,498	85,498
Switch engine ownership	14,976	14,976	14,976
Operating division organization	(40,487)	(40,487)	(40,487)
Information systems:			
Personnel:			
Agencies and yards	(280,000)	(672,000)	(369,000)
Mechanical installation	(62,500)	(123,000)	(123,000)
Data processing equipment leases:			
Agencies and yards	(75,000)	(180,000)	(180,000)
Mechanical installation	(20,000)	(40,000)	(40,000)
Nonrecurring costs	(1,175,000)	----------	----------
Communications:			
Telephone	(115,339)	(552,560)	(112,560)
Data transmission circuits	(141,420)	(98,539)	(98,539)
Marketing offices	104,768	123,468	147,468
Dispatchers' circuits	(3,900)	(2,400)	(2,400)
Radios	(1,142,635)	----------	----------
Compatibility of equipment:			
Locomotives	(617,458)	(287,057)	(287,056)
Cabooses	(276,902)	(276,903)	(276,903)
Ice machines	14,778	29,555	44,300
Standaridized locomotives:			
Heavy repair policy	(1,240,781)	(503,823)	(232,816)
Consolidated maintenance facilities and functions:			
Rail welding	364,960	418,960	418,960
Airbrake maintenance	27,761	207,131	207,131
Freight car dismantling	16,068	32,136	32,136
Locomotive repairs	115,133	390,503	390,503
Undiverted joint traffic:			
Use of shorter routes	630,539	630,539	630,539
Interchange cost	480,332	480,332	480,332
TRRA charges	26,188	26,188	26,188
Upgrading plans (SLSF line in Kansas)	----------	(370,983)	(185,492)
Equipment:			
Locomotive acquisition:			
Four-axle, 2,000 horsepower	(1,235,969)	(1,235,969)	(1,235,969)
Six-axle, 3,000 horsepower	(4,233,047)	(4,233,047)	(4,233,047)
Caboose acquisition	(140,505)	(140,505)	(140,505)
Car utilization:			
Reduced handling	887,504	887,504	887,504
Investment saving	1,706,000	3,440,000	5,118,600

Calculation of net operating savings (costs) (excludes cost of handling diverted traffic)—Con.

Item	Year		
	One	Two	Three
Purchasing:			
Increased revenue from scrap	195,232	195,232	195,232
General purchases	840,000	840,000	840,000
Freight car purchases	100,000	100,000	100,000
Overhead:			
Nonlabor	2,557,417	4,231,370	4,335,724
Labor	6,759,994	10,417,256	10,659,831
Exempt employee benefits:			
Pension plan	(592,825)	(501,475)	(494,950)
Medical plan	129,620	159,860	162,020
Life insurance	(218,167)	(204,181)	(203,182)
Accident	(40,914)	(40,561)	(40,536)
Short-term disability	144,612	149,316	149,652
Long-term disability	(28,120)	(22,660)	(22,270)
Dental plan	50,846	56,978	57,416
Travel accident	(5,888)	(5,562)	(5,539)
Grand total	7,269,099	17,088,880	20,363,549

Cost of handling diverted and undiverted traffic.—In addition to studying the effects upon costs incurred at specific common point locations and for certain functional activities, applicants made an analysis based upon variable costs produced by the Rail Form A cost formula to measure the difference in costs expected to arise from changes in routing. For this purpose applicants utilized a consolidated Rail Form A which incorporated data for BN, Frisco, FW&D and C&S in 1976.

Applicants' cost analysis reflects the amount of traffic diversion anticipated, internal rerouting of existing traffic to utilize the improved operational network, and the elimination of interchange costs at present junctions of the merging railroads. The combined Rail Form A of the four companies was used because of a belief that such an aggregation best represented the cost behavior of the consolidated system, *excluding* the savings identified and measured in the special studies described above.

Three files were created to accomplish the cost calculations: movement file, car data file, and unit-cost file.

The movement file consisted of records on movements considered to be subject to handling modifications in a postmerger environment. These records contained service unit factors relative to existing and potential handling procedures, including car identification and routing specifications.

The car data file contained extracts from the 1976 Universal Machine Language Equipment Register. Thus, per diem and per-mile rates for the average age and ledger value by car type in the national fleet as listed in the "Car-Hire Rate Table" in effect in January 1977, were used. The only exceptions to this procedure involved use of Trailer Train Company charges for all flatcars in TOFC service and for automobile racks regardless of ownership, use of dry van equipment charges in TOFC plan II service for trailer movements, regardless of trailer type or plan involved, and arbitrary adoption of the third lowest of six rates applicable to tank cars regardless of the actual car employed.

The unit-cost file contained variable unit costs and empty return ratios derived directly from the consolidated, four-railroad Rail Form A application. However, because Frisco TOFC movements are recorded in that company's records on the basis of trailers handled without regard to the number of flatcars assigned for loading, an assumption was made that 1.5 trailers per car represents Frisco average experience. A region VII average of 3.645 trailer-days and 1.75 car-days in terminals, was used for all TOFC movements.

No costs for mechanical protective service against heat and cold were included. Such treatment is claimed to be consonant with the exclusion from revenue of charges paid by shippers for these extra services. Cost of inspection was included based on experience of the Western Fruit Express.

Because interchange switching charges assessed by TRRA for handling of cars at the St. Louis gateway are treated in the accounts as a deduction from gross freight revenues, applicants developed the cost of such handling separate from the remaining Rail Form A costs. Based upon the 1976 rate of $60.06 per loaded car, the total net additional cost of traffic diverted by the BN portion of the merged system would have been $2,384,207. No credit was taken to reflect the applicable $19.33 per car refund available under certain conditions for preblocking or, apparently, the $14 empty car rate.

A hypothetical, but allegedly typical, boxcar load of 12 lading tons moving from Minneapolis, MN to Tulsa, OK demonstrates applicants' costing process. The present route is assumed to be: BN-Denver-C&S-Sixela-FW&D-Fort Worth-ATSF. Following merger the new route is presumed to be: BN/Frisco direct (via Lincoln, NE and Kansas City, MO).

Using average train costs, which weights the system through and way train experience for trailing ton-miles, locomotive unit-miles, and crew compensation, applicants determined the change in line-haul costs arising from the overall shorter distance handled on applicants' lines. The resulting net reduction in applicants' total mileage is a composite of fewer miles on present BN lines, elimination of all operation on C&S and FW&D lines, and addition of present Frisco in the routing. The line-haul cost reflects 31.1 tare tons for car equipment, a per diem rate of $5.29 per car-day, a per-mile rate of 3.32 cents per car-mile, and a ratio of 0.78 empty car-miles to loaded car-miles applicable to unequipped general service boxcars.

All interchange costs presently incurred on such a hypothetical car at Denver, Sixela, and Fort Worth were assumed to be saved. Both before and after merger such a car is accorded in applicants' calculations intertrain/intratrain switching cost predicated upon one such switch each 200 miles as specified in Rail Form A. Thus, the overall lower mileage in single-line service results in an overall switching cost reduction following merger.

Car costs were calculated using per-day and per-mile rates, increased for Rail Form A general overhead, from the car data file applicable to the average car in the national boxcar fleet. Turnaround days were predicated upon the standard days developed in Rail Form A for line-haul and switching service.

Destination terminal costs for switching and station clerical services, not incurred under the existing routing, are included under postmerger assumptions. Loss and damage, calculated with respect to the experience for average commodity payout at both origin and destination, was also applied to Tulsa, the destination in this example.

All of the foregoing cost components were quantified for each of the premerger railroads and for the overall net cost reduction as follows:

BN	$138.26
C&S	191.22
FW&D	232.01
Frisco	(179.05)
Total	382.44

Thus, for the example movement, the merged company would have saved $382.44 had the car been diverted as contemplated.

After inclusion of savings arising from lesser use of TRRA, expansion of the cost study sample results to a merged system results in cost increases as calculated by applicants of $49,245,586 for diverted traffic and a saving of $1,137,059 for rerouting of undiverted joint traffic annually, based on 1976 traffic volume (Tr. 1534).

Employee protection.—Applicants made separate analyses of employees by craft to determine the effect of positions abolished and added. Although preliminary discussions have been held with representatives of employee organizations, no definitive agreements have been reached with respect to provision of protection to displaced employees. Nevertheless, for purposes of projecting probable costs, certain assumptions were made.

For each job eliminated, 1.5 employees were assumed to be subject to placement in lower-rated positions for an average of 36 months, requiring a displacement allowance payment of 5 percent of the applicable wage. It was further assumed that seniority districts at common points would be consolidated, and that scheduled employee attrition would occur at the rate of 7.5 percent per year, with 90 percent of clerical employees and 100 percent of other employees successfully placed in other vacant job positions. Finally, 10 percent of scheduled employees asked to transfer to new locations are expected to do so, at an average cost of $10,000 per employee.

Exempt employees were assumed to be absorbable through normal 6.2 percent attrition. However, applicants anticipated that 95 percent of dislocated employees would elect to transfer at a cost to applicants of $12,500 each. For purposes of these calculations applicants used an average annual salary of $21,500 plus 29.93 percent fringe benefit additions.

The employee protection costs arising from the proposed merger were projected as follows:

	Year		
	One	Two	Three
Scheduled	$7,771,180	$6,776,263	$4,546,696
Exempt	8,187,991	1,061,614	91,901

The total net benefits in the first 3 years of merger (1976 price level) are projected by applicants as follows:

TABLE I-2

Net benefits to applicants

	Year		
	One	Two	Three
Net operating savings	$7,269,099	$17,088,880	$20,363,549
Diverted traffic revenues	42,966,235	62,796,805	66,101,900
Cost of handling diverted traffic	(32,009,631)	(46,783,307)	(49,245,586)
Employee protection cost	(15,959,171)	(7,837,877)	(4,638,597)
Net benefit	2,266,532	25,264,501	32,581,266

PROTESTANTS' EVIDENCE

Cost studies were submitted by Rock Island and Milwaukee Road. However, we have rejected the estimates of traffic diversion upon which they are based. We have found that Rock Island as an operating entity no longer exists and thus will not be affected by the merger. Milwaukee Road's future configuration (if any) is uncertain. Therefore, reasonable estimates of the diversion it would encounter as a result of the merger cannot be made. For this reason, we need not discuss these carriers in this appendix.

Chicago & North Western

CNW claims that "almost all" of the gross revenue derived from its traffic subject to diversion represents a potential reduction in net income. It asserts that no changes in operating methodology can be effecutated through elimination of the diverted traffic and claims that no cost savings related to locomotives, crew wages, or cabooses are realizable. Thus, costs incurred relative to freight-train cars and roadway maintenance, as processed through Rail Form A for its 1976 operations, constitute the primary savings attributable to the divertible carloads. Additionally, specific costs representing loss and damage, intermediate and terminal absorbed switching charges, joint facility expenses, and other (not specifically defined) saveable expenses were accumulated.

CNW projects lost revenues of $2,462,220, offset by $428,860 in saveable costs, resulting in a "net loss" of $2,033,360 attributable to the merger.

Illinois Central Gulf

A study of 1976 traffic by ICG indicated that 50 percent of the ultimate diversion (23,933 cars, containers, or trailers) would be expected to occur in the first year after merger. In the second year 90 percent is projected to have occurred, with the entire diversion experienced by the third year. ICG believes that the geographical dispersion of the identified traffic losses is sufficiently widespread to preclude any elimination of train-miles or switching. Expense savings were projected in only four categories.

Car ownership.—ICG used time and mileage rates corresponding to car type and value from the applicants' evidence. Service units underlying the cost computations for the diverted cars were predicated upon Rail Form A factors of incurrence of an intertrain switch each 200 miles and an average of 414.8 car-miles per car-day in running service on ICG. Southern region empty return factors were applied to the car types. ICG developed by car type the combined per diem and per-mile car-hire cost per loaded car-mile. This combined cost was then applied directly to the change in

car-miles for each car in the traffic study to determine the line-haul car cost saved for lost traffic or incurred for added traffic. Terminal and interchange car costs were similarly calculated by relating the per diem rate to the Rail Form A days assumed for these types of handling.

Switching charges.—Based upon ICG's 1976 system experience, payments to terminal companies and road haul carriers for handling ICG movements in and through terminals constituted 5 percent of gross revenue. Such amount was applied to the estimated revenue diversion to project the reduced amount of switching charges.

Gross ton-mile cost.—The unit cost from Rail Form A, which consists primarily of costs related to roadway maintenance, was applied to the gross ton-miles generated by the cars subject to diversion. This latter amount was developed by expanding the total loaded car-miles of such cars by the system ratio of trailing gross ton-miles to loaded car-miles. Miscellaneous car-mile costs—ICG claims to have accumulated unit costs, for mileage car inspection, train supplies and expenses—running, and car cost—intraterminal, respectively. The total of the three unit costs was applied to the total car-miles of the cars subject to diversion, calculated by expanding the loaded car-miles of the cars so identified by the system average empty car mileage factor.

The net effect of the estimated revenue diversion and the offsetting costs described above is as follows:

Statement of net losses from diversion—ICG

Item	Year		
	One	Two	Three
Revenue diversion	$4,336,451	$7,805,611	$8,672,901
Expense savings:			
Car ownership	653,074	1,175,533	1,306,148
Switching charges	216,823	390,281	433,745
Gross ton-miles	945,669	1,702,204	1,891,338
Miscellaneous	90,764	163,375	181,528
Total	1,906,330	3,431,393	3,812,659
Net loss	2,430,121	4,374,218	4,860,242

Missouri-Kansas-Texas

Katy projected the probable incidence and locations of divertible traffic, calculating the changes in Katy revenue which would result therefrom. The changes in traffic density were summarized by determining the loss of carloads for each of 26 segments corresponding to key junctions and yards comprising Katy's system. Operating officers used the resulting schematic summary to project changes in dispatching and scheduling. Additionally, this summary was used to assist in identifying locations where yard, clerical, and shop forces may be reduced. In planning for the reduced-scale operation Katy took into consideration locomotive horsepower ratings by direction and territory as applied to the lower traffic level, fewer required switch engine-hours at specified points, and locomotive and car repair requirements. A major reduction in train-miles could occur only in the Kansas City-Parson segment. Certain lease payment applicable to freight cars are fixed obligations irrespective of use, thus minimizing opportunity for substantial reduction in car costs. Similarly, roadway

rehabilitation loan agreements previously negotiated with the U.S. Government contain covenants restricting management's freedom to defer maintenance expenditures.

Based upon operating estimates of the resources required to handle the lesser amount of railroad activity following loss of the divertible traffic, Katy processed a Rail Form A application using 1976 expense levels but excluding accounts deemed not affected by traffic diversion. Thus, the accounts remaining as input to the Rail Form A were those subject to reduction, except that some activities, *e.g.*, joint facility usage, yard operation, and repair functions, were analyzed through special studies and considered separately from the Rail Form A structure. Another modification was adoption of 100-percent variability to assure that cost savings were not understated.

In projecting the cost savings realizable through the handling of fewer carloads, unit costs from the Rail Form A modified as described above were applied to the service units not performed. Through accumulation of the products obtained by multiplying the adjusted unit costs by the service units of lost traffic, the aggregate Rail Form A-basis savings was obtained.

Car costs were developed based on the category of car. Foreign car payments were included in saveable costs at the mileage and per diem rates applicable to the particular cars, using actual miles and estimated days on Katy's line, based on Rail Form A factors. Certain low-capacity boxcars of ownership series found to be surplus in 1976, and hence incapable of generating car-hire revenues, were ascribed minimal saveable costs generally confined to nominal maintenance and depreciation. On the other hand, the remainder of its car fleet is regarded to be in demand by other railroads, resulting in the ability to generate off-line income from foreign railroads 66 percent of the time. Thus, per diem and per-mile earnings would offset a portion of the cost of owning cars made idle by the merger. These car-hire credits serve to enlarge the saveable costs.

TOFC trailer costs were based upon known per diem payments for foreign equipment, and lease payments to the owners of trailers with Katy markings. Since many such trailer leases provide for short notice cancellation, a merger-induced traffic decline would lead to the avoidance of trailer lease payments.

Joint facility savings were constructed by identifying the lines or terminals where traffic loss would ensue and measuring the difference in proration of expenses arising from declines in usage. Where joint facility charges are included in operating expenses (rather than revenue deductions), general overhead was applied to calculate the total cost savings.

Seven locomotives and one caboose released from active service through the expected decline in traffic would be available to handle future increased carloadings related to movements not susceptible to diversion. Protestant claims this equipment would not be leased, sold, or scrapped, but held in storage for this future need, estimated at 3 percent per year, exclusive of coal. The annualized savings generated through the avoidance of acquiring the equipment new at 1976 prices ($399,923 for a 2,000 horsepower GP-38-2; $40,000 for a steel caboose with cupola) with an 11-percent interest rate was included.

Katy projected the specific number of yard and general office position subject to elimination or to reduced hours. It included in its savings the labor dollars and related fringe benefits and departmental and general overhead applicable to these positions.

Pickup and/or delivery cost of TOFC trailers was calculated in connection with the loss of 614 trailer handlings. These movements involve trailers in plans II, II 1/4, and V, and are distributed over protestant's entire system.

The aggregate "Total Expense Reduction" of $5,477,450 contrasts with the claimed "Total Revenue Loss" of $11,572,615.

Soo Line

Soo Line anticipated the loss of 3,935 carloads of traffic and the same number of empty cars returned. Further, it claims that no reduction in train-miles or train service could have been realized because the affected movements were widely dispersed over the system.

The following savings were identified, however.

1. *Car and trailer costs.*—Car-days were based upon actual experience of loaded cars in movement records, doubled for empty handling and subject to maximum and minimum bounds, to reflect normal transit times. Car-miles were determined by the actual distances between terminals, including intraterminal mileage, where applicable. These car-days and car-miles were then applied to the rates (including incentive car-hire) in effect during the period of movement. Trailer cost was treated in a similar manner.

2. *Fuel cost.*—The gross ton-miles for each car movement were multiplied by the 1976 average fuel cost on a per gross ton-mile basis, as well as an estimate reflecting State fuel taxes. The gross ton-miles are based on waybill lading weight, AAR average tare weight by equipment type applied to actual cars used, and miles traveled (including distance to connecting railroads' yards when handled to certain junctions at Chicago).

3. *Joint facilities.*—Certain traffic handled through the Twin Ports, Twin Cities, and Chicago was assigned the joint facility expense actually applicable at these locations. The 1976 average costs used in the calculation reflect a variety of flat rates, rentals, and fixed or variable maintenance and operating charges.

4. *Loss and damage.*—Soo Line's actual 1976 ratio of loss and damage expenses to system freight revenue at the two-digit commodity grouping was applied.

5. *Minnesota State tax.*—The revenues of interstate carloads were stratified in accordance with various proportions of though movements allocated to Minnesota on a mileage proration basis. The revenues thus attributable to Minnesota were considered subject to that State's 5 percent gross earnings tax.

6. *Drayage cost.*—Based upon data applicable to plan II TOFC movements involving delivery, pickup, and in certain instances interchange at Chicago, the drayage charges for loaded and empty trailers were included.

7. *Absorbed switching.*—Absorbed switching charges were identified as cost savings.

8. *Insurance.*—In some instances, the amounts of insurance premiums are fixed in accordance with operating revenues. Where appropriate, these costs are allegedly subject to reduction and were considered.

Summary.—Based on class of traffic, Soo Line indicates the following results of its study:

Class	Carloads	Revenue	Expenses	Net loss
Interline forwarded	154	$50,480	$29,044	$21,436
Interline received	439	158,128	77,454	80,674
Overhead	3,342	1,072,671	361,579	711,092
Total	3,935	1,281,279	468,077	813,202

APPLICANTS' REBUTTAL EVIDENCE

On rebuttal applicants restated the methodology employed by the protestant railroads based upon applications of Rail Form A variable unit costs developed in much the same manner used in the calculation of its own changed costs. Applicants contend that such an approach to costing is equally applicable to determining costs on these roads. Applicants believe Rail Form A to be preferable to the protestants' approach because it is said to provide the best measure of the ultimate operating changes made to accommodate the reduced traffic volume. Applicants also observe that the protestants, while uniformly contending that a Rail Form A approach overstates costs, are not in complete agreement among themselves with respect to identifying the nature of their cost savings.

Applicants have not accepted the protestants' traffic diversion estimates in their rebuttal calculations. Nevertheless, they maintain that use of the Rail Form A costing methodology applied to either applicants' or to protestants' traffic data establishes that protestants will be successful in reducing operating costs to a greater degree than indicated in protestants' evidence. For the Soo Line, calculations indicate that diversion of traffic allegedly handled at a loss will result in a net gain of $65,041.

The results of applicants' cost analysis applied to these respective traffic studies in the third year of merger are as follows:

TABLE I-3

Calculation by applicants of protestants' net loss

Railroad	Applicant's diversion studies			Protestants' diversion studies		
	Gross revenue loss	Cost	Net loss	Gross revenue loss	Cost	Net loss
CNW	$1,895,180	$1,877,145	$18,035	$2,462,220	$2,190,199	$272,021
MILW	3,054,960	2,701,389	353,571	14,089,930	10,144,749	3,945,181
CRIP	4,504,680	3,571,955	932,725	8,634,074	6,101,273	2,532,801
ICG	6,592,500	5,759,971	832,529	8,672,901	6,779,582	1,893,319
MKT	6,531,180	5,151,385	1,379,795	11,572,615	9,170,604	2,402,011
SOO	243,200	181,518	61,682	1,281,279	1,346,320	(65,041)

MISCELLANEOUS PROTESTANTS' ARGUMENTS

CNW argues that savings arising from the ability of the merged company to defer car purchase because of improved fleet utilization are illusory because BN has not demonstrated that it would commit itself to such an acquisition if the merger were not consummated. It also suggests that the cost of protective conditions may have been understated because recent history indicates such consequences.

Milwaukee Road suggests that the need of the individual merging railroads for additional freight car capacity to meet continuing equipment shortages can be met in part by joining federally sponsored "clearinghouses" rather than looking to the merger to generate car availability. This protestant also urges that applicants could relax restrictions of the "home loading car rule" to accomplish the same objective. Finally,

it argues that material purchase discounts and scrap sale benefits could be realized without actual merger of the companies.

Katy states that compatibility with guidelines for the traffic diversion study requires calculation of its reduced costs confined to operating changes arising from merger-related traffic losses only. In other words, economies resulting from future operating innovations should not be deducted from lost revenues in calculating the effect on net income unless those innovations are specifically instituted in response to the traffic diversion. For this reason it objects to a calculation of savings of its lost traffic based upon Rail Form A, because that cost formula allegedly would measure long-run variability which reflects countless causative factors influencing operational changes unrelated to implications of the instant merger application.

COMMENTS ON ANALYSES

Applicants' evidence.—The net operating savings projected by applicants appear to have been calculated in accordance with a thorough, systematic analysis by which various functions were studied by location to determine the effects of changed practices following a merger. A sound rationale was offered for implementation and advance planning required to integrate the proposed changes in the flow of loaded and empty cars over the combined system. Necessary modifications to the physical plant and provision for staffing the requisite managerial positions appear well conceived.

Railroad protestants did not rebut the overall operating savings developed by applicant. Nevertheless, a few of their observations merit comment.

We do not believe applicants should be faulted in their calculations of freight car acquisition savings. Future car purchases will necessarily be scheduled in accordance with the demands of shippers in the years ahead. Certainly the creation of additional car availability through the merger will be a factor in the placement of new orders. Thus, it is not unreasonable to assume that the anticipated savings will materialize.

Similarly, applicants' projection of labor protection costs is not unreasonable. Applicants have postulated their estimate based upon BN's recent experience in such costs. There is no evidence warranting rejection of applicants' best judgment.

A decision by BN not to participate in activities of freight car clearinghouses appears to have little or no relevance to the merits of the merger application. We do not believe this proceeding should become a forum for debate regarding overall railroad efficiency. That the merged company would gain car-days from approval of the applications and that a reasonable cost saving was ascribed thereto is sufficient reason to include such savings in a calculation of merger benefits. Similarly, we believe that material purchase discounts and scrap sale receipts can be more easily obtained by applicants after consolidation of these activities.

We find that the use by applicants of variable costs from Rail Form A was appropriate in projecting the changes in costs expected to arise from the rerouting of both diverted and undiverted traffic. Since applicants anticipate no significant changes in handling other than those for which separate costs were developed in the operating studies, the long run nature of variable unit costs in Rail Form A appears appropriate for determining the effect on net income of implementing the rerouting plan.

However, it is not clear that the composite Rail Form A for the four railroads (BN, Frisco, C&S, and FW&D) provides the most effective means of establishing the variable cost of rerouting. The unit costs in such a composite necessarily reflect both the level of efficiency of each constituent railroad and the proportion that each

comprises of the total. While a composite application of Rail Form A for all four railroads may reflect a postmerger cost level, application of premerger unit costs from separate Rail Form A applications to prediversion movements may have resulted in differing costs. We believe it would have been preferable for applicants to have demonstrated the difference between premerger and postmerger operation through a comparison of individual railroad Rail Form A costs applied to premerger statistics with the composite unit costs applied to postmerger statistics, respectively. Nevertheless, applicants' methodology will not be rejected.

Protestants' evidence.—Although Rail Form A is a satisfactory method for ascertaining the variable cost impact of rerouted traffic on the merged lines, we do not believe such an approach provides relevant costs reflective of the effect on protestant railroads of traffic lost by them. While there exists convincing evidence that applicants will have implemented their operating plan and realized the bulk of the expected savings by the end of the third year, it appears that protestants will require a much longer time frame in which to adjust to the changed competitive conditions following merger. The applicants, as the moving force behind the merger, could freely pursue all available alternatives in their quest to alter the *status quo*, including not going forward with the application until a time most propitious to their interest. On the other hand, protestants' opportunities in acting either to retain divertible traffic or alter operating strategies to minimize adverse impacts are extremely limited in comparison. Major restructuring of facilities to accommodate reduced traffic flows after a merger of competing lines may require considerably more time to implement than the 3-year period in which applicants project the traffic diversion will occur. Thus, protestants' incremental approach to calculating their cost savings, which applicants characterize as short term, may, in fact, represent the only savings available to them in the foreseeable future.

We note that in constructing the amount of cost savings reasonably anticipated, the protestants adopted a wide variety of methodologies. For example, in some instances protestants' costs were derived by extracting from the Rail Form A formula, which is designed to measure costs on a long-term basis, only those elements believed actually obtainable to protestants. Other protestants developed unit costs derived from a limited number of expense accounts and related operating factors (*e.g.*, gross ton-mile), with application to similar factors derived from studies of divertible traffic. In some instances, protestants made special analyses of operations unique to their railroads, examples of which include joint facility charges, loss and damage payments, State taxes on gross revenues, TOFC drayage, absorbed switching, and insurance premiums.

With few exceptions, protestants' cost studies of specified operating functions appear to have developed reasonably acceptable results indicative of the savings that can be expected to accrue. Dissimilar impacts will occur on these railroads, leading to the conclusion that prescription of a uniform formula from which procedural departure is proscribed would be unwise and would unduly stifle the ability of protestants to measure effects that may be unique to each. Thus, the savable costs as shown on table I-4 are found to be generally acceptable, subject to enhancement or modification with respect to six critical cost categories discussed below. Only Katy quantified realizable reductions in each such category.

TABLE I-4

Protestants' calculations of savable costs (based upon protestants' diversion estimates), year three of merger

	CNW	ICG	MKT	SOO
Accounting	----	----	$56,442	----
Car inspection	----	(1)	13,894	----
Car investment	----	----	147,168	----
Car rents	----	$1,306,148	1,869,479	(1)
Fuel-road locomotive	----	----	(1)	(1)
Gross earnings tax	----	----	----	(1)
Insurance	----	----	----	(1)
Joint facilities	(1)	----	121,333	(1)
Loss and damage	(1)	----	101,038	(1)
Road crew	----	----	351,293	----
Road locomotive	----	----	527,627	----
Roadway maintenance	(1)	1,891,338	797,691	----
Special services	----	----	4,383	----
Station/TOFC clerical	----	----	48,280	----
Switching charges	(1)	433,645	434,866	(1)
TOFC drayage/tiedown	----	----	121,022	(1)
Train supplies and expenses	(1)	(1)	83,597	----
Yard operation	----	----	799,607	----
Miscellaneous	(1)	(1)	----	----
Total	428,860	3,812,659	5,477,450	468,077

[1]Unitemized amount included in total.

Car rents.—The extent to which divertible traffic is generally handled in cars owned by other than the protestant railroads has not been suitably summarized on this record. Nor (with the exception of Katy) have definitive studies been made of feasible disposition of protestant-owned cars carrying divertible loads which would be released for other purposes following merger-induced diversion. Nevertheless, since the other protestants utilize foreign car equipment generally, the assumption is warranted that such equipment may be handling divertible traffic. Although certain of protestants' idled cars may be used elsewhere to generate rental income, savings in the form of avoided car-hire charges would likely accrue to all protestants. No rental income revenue can be projected, however, because of the speculative nature of the demand for car equipment by other railroads.

Roadway maintenance.—It is recognized that budgeted maintenance expeditures can be curtailed to varying degrees by management. Nevertheless, the operation of freight cars over a right-of-way contributes to the deterioration of the roadbed and track structure, necessitating periodic expenditures to restore these basic items to a usable condition. A premanent loss of the diverted cars, including related empty car movement, contributes to a deceleration of the deterioration, thus, saving funds otherwise required for roadway maintenance. In the 3 years following merger not all protestants may be able to realize the full amount of these savings. Thus, figures constructed on this basis represent typical savings for the basic roadway maintenance expense accounts.

Joint facilities.—Some protestants did not identify locations where the divertible traffic presently incurs joint facility charges; nor did these protestants expressly indicate that such charges are not applicable. Since debits to the joint facility rent, maintenance, and operation accounts are contained within the railroads' Annual Report Forms R1, existence of such handling is confirmed. Savings related to joint facilities may be reasonably expected to accrue with loss of the divertible traffic.

Switching charges.—Payments made to other companies to perform switching services were projected to be savable by some protestants, while other protestants remained silent. A portion of the divertible traffic may incur such charges, the saving of which would be realizable after merger-induced traffic diversion. It is presumed that the incidence of these switching service payments is similar to the average incidence of all traffic except where otherwise specified by protestants. It is recognized, of course, that not all switching charges billed to railroads relate to carloads accorded line-haul service.

Train supplies and expenses.—The train supplies and expenses account reflects a variety of transactions. Although not all of these expeditures would vary with minor fluctuations in traffic volume, a substantial portion is subject to reduction. Consequently, protestant railroads experiencing potential diversion to the merged company should project savings in this account.

Loss and damage.—The incidence of loss and damage to lading, leading to the filing and honoring of freight claims, would be expected to decline with the handling of fewer carloads by protestants after applicants' merger. Thus, all railroads projecting traffic losses should provide for reduced freight claim payments.

In those instances where protestants failed to project savings in the six cost categories listed above, we have made calculations from available data to recognize such potential savings. While the protestants themselves possess access to more definitive data applying to their own operation, we employed 1976 freight service expenses and statistics to develop unit costs used in deriving the savings in these categories omitted by protestants. We did not have sufficient traffic data to recognize the desirable distinction between costs related and unrelated to distance. Nevertheless, the lack of such precision does not prevent the construction of figures suitable for insertion on a per car basis in the itemized listing of potential cost savings. No distinction was made between cars, containers and trailers.

A summary of unit costs with a description of their derivation appears in table I-5. In table I-6 we have indicated the aggregate effect by cost category of extending the enhancement to the protestants' calculations of savings from table I-4.

The restated costs per divertible carload (protestants' diversion estimates) range from $93.29 for CNW to $269.72 for Katy.

However, in view of our finding that several protestants' traffic diversion estimates are unacceptably high, it is necessary to restate the aggregate cost incurred in handling fewer carloads. In table I-7 we have indicated for year three of the merged company's operations the estimate of revenue diversion. Where such diversion reflects a reduced traffic level below that originally forecast by individual protestants, we have adjusted the cost savings downward in the same proportion as the reduction in revenues. For those protestants whose revenues were not so reduced, the restated costs shown were taken directly from table I-6. The net gain (loss) results from subtracting the cost savings from the revenue diversion.

Since we accept applicants' rate of traffic diversion as reflective of the anticipated timing of the traffic shifts, those projections were incorporated into development of the net loss projected in table I-7 for each protestant in years one and two of the merger. These rates of diversion were 65 percent and 95 percent, respectively.

TABLE I-5

Calculation of unit costs in restatement based upon annual report R1 (1976)

	CNW	ICG	MKT	SOO
Car rents[1]	$40.34			
Joint facilities[2]		$5.73		
Loss and damage[3]		4.70		
Roadway maintenance[4]				$39.45
Switching charges[5]				
Train supplies and expenses[6]				7.79
Number of loaded cars[7]	1,560,294	1,785,381	$287,282	382,267

[1]Bases of payment: mileage; TOFC/COFC; and combination of mileage and per diem.
[2]Accounts 278, 390, 412, 541.
[3]Account 418.
[4]Account 212, 214, 216, 218, 220 (running tracks).
[5]Account 110 (debit portion).
[6]Account 402.
[7]Schedule 531, column (d): line 31 ÷ [line 34 ÷ (line 12 + line 13)].

TABLE I-6

Restatement of protestants' calculation of savable cost (based upon protestants' diversion estimates), year three of merger

	CNW	ICG	MKT	SOO
Accounting				
Car inspection				
Car investment				
Car rents	$326,754			
Fuel-road locomotive				
Gross earnings tax				
Insurance				
Joint facilities		$12,235		
Loss and damage		14,199		
Road crew				
Road locomotive				
Roadway maintenance				$143,431
Special services				
Station/TOFC clerical				
Switching charges				
TOFC drayage/tiedown				
Train supplies and expenses				30,654
Yard operation				
Miscellaneous				
Adjustments	326,754	26,434		174,085
Protestants' costs	428,860	3,812,659	5,477,450	468,077
Restated costs	755,614	3,839,093	5,477,450	642,162
Divertible carloads	8,100	23,933	20,308	3,935
Cost per carload	93.29	160.41	269.72	163.19

Note: Adjustments shown above obtained by multiplying the unit costs in table I-5 by the protestants' calculations of divertible carloads.

TABLE I-7

Restatement of protestants' net gains (losses)

	CNW	ICG	MKT	SOO
		Millions		
Year one (65 percent):				
Revenue diversion	$1.60	$4.41	$5.69	0.32
Cost savings	0.49	1.95	2.71	0.16
Net gain (loss)	(1.11)	(2.46)	(2.98)	(0.16)
Year two (95 percent):				
Revenue diversion	2.34	6.44	8.31	0.47
Cost savings	0.72	2.85	3.96	0.24
Net gain (loss)	(1.62)	(3.59)	(4.35)	(0.23)
Year three (100 percent):				
Revenue diversion	2.46	6.78	8.75	0.49
Cost savings	0.76	3.00	4.17	0.25
Net gain (loss)	(1.70)	(3.78)	(4.53)	(0.24)

APPENDIX J

Financial matters

The appendix contains financial information on the major railroads impacted by the merger. The data consists of amount of deferred maintenance, delayed capital improvements, and historical financial information.

Balance sheets and income statements are provided to show each carrier's financial condition. The other financial items selected for analysis, taken from reports filed with the Commission, are items generally accepted as criteria in determining the financial posture of a transportation entity. For each railroad the data is formulated into four tables related to net income, working capital, rate of return, and debt structure.

The rate of return on net investment is one of the significant criteria used by financial institutions in evaluating the health and stability of an enterprise. The Commission has found as acceptable a ratio of 70-percent total debt to 30-percent equity as a yardstick for finding that the carrier has a fairly sound credit position. The rate of return on net investment in transportation property was determined by means of the ratio between railway operating income and investment in transportation property less accrued depreciation and amortization plus cash and materials and supplies.[1] This ratio reflects the adequacy of earnings for transportation operations. Fixed charge coverage is calculated as the number of times fixed charges are covered by available income. The operating ratio is the ratio of railway operating expenses to railway operating revenues.

Several factors should be considered in reviewing the data:

[1]The Commission adopted in Ex Parte No. 338 the principle of using Rail Form A in computing working capital, to be used in the denominator in lieu of cash and materials and supplies.

(1) In 1974, the Commission adopted the equity method of accounting and the interperiod tax allocation method of accounting for income taxes. Net income for 1974 to 1978 is restated for comparability with prior years.

(2) FASB No. 13, was adopted by the Commission, effective January 1, 1977. It established criteria for distinguishing between capital leases and operating leases. A capital lease is required to be recorded as an asset and an obligation at the amount equal to the present value at the beginning of the lease term of minimum lease payments, and such asset amounts are amortized on a straight-line basis by periodic charges against earnings. Minimum lease payments are allocated between reduction of capital lease obligation amounts and interest expense. Operating lease rentals are expensed as incurred.

(3) The Uniform System of Accounts was revised as of January 1, 1978. "Equipment obligations and other long-term debt due in 1 year," have been included in total current liabilities for 1978. A new procedure for reporting and classifying "railway operating expenses," resulted in major changes from prior years and a railway operating expense which is not comparable to earlier years. "Total long-term debt due after 1 year" no longer appears in the balance sheet as a separate item, but has been replaced by "total noncurrent liabilities," which is composed of the equivalent of "total long-term debt due after 1 year" plus several additional accounts.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

CNW's predecessor was historically unprofitable. The year in which CNW was purchased by its employees and the first year subsequent the carrier reported record profits. These profits were as a result of reduced depreciation, nonrecurring earnings and a generally prosperous time for the railroad industry.

In only one year since 1973 did CNW report a net income ($3 million in 1976). 1973 was the last year that a positive working capital was reported. In 1973, the carrier's working capital ratio was only 1.08 and working capital was well below the monthly average working capital requirement. CNW did report an average rate of return of about 3 percent for the period 1973 to 1976. However, the return was influenced significantly by a major decline in the carrier's investment in transportation property as a result of the purchase of the carrier's assets. The carrier's ratio of debt-to-debt plus equity has been 90.0 or higher since 1972. Such a high ratio strains cash flow, limits the carrier's borrowing capacity and creates high interest expense.

CNW's financial condition has been deteriorating progressively and the carrier is in marginal financial condition. It could be placed in a precarious financial condition by a sharp downturn in the economy or other major adversity. Results for the first 6 months of 1979 indicate a net loss of $38.1 million, as compared to a net loss of $10.3 for the comparable period in the previous year. The carrier's cash position has been weakening and in February 1979 a drawdown on a line of credit helped to avert a cash crisis. The carrier has recently acquired another line of credit for working capital purposes. Both credit arrangements used railroad equipment as collateral.

CNW has been successful in obtaining Federal financing and federally guaranteed loans. Since September 9, 1977, FRA has approved CNW applications totaling $192 million. As of September 30, 1979, CNW has drawn down $93.1 million from this source for specific track and equipment rehabilitation projects. CNW has also applied for additional funding totaling $230.5 million.

The long-term prospects for CNW are highly uncertain.

Maintenance.—CNW's maintenance expenditures in current dollars and in constant dollars have risen in recent years. Its maintenance-of-way-and-structures expense as a

percent of operation revenues generally has been below the averages for class I and western district railroads. However, in 1977 CNW's ratio was in line with the western district's, while below the class I average. The increase in expenditures in recent years was made possible by government assistance.

Maintenance of way and structures—CNW

	Actual	Per equated track-mile	As a percent of operating revenue	Per equated train-mile in 1967
	Thousands			
1977	$87,815	$7,961	15.6	$3,272
1976	73,720	6,456	13.9	2,857
1975	65,255	5,652	14.2	2,769
1974	70,200	5,787	14.7	3,204
1973	49,006	3,998	11.9	2,422

Crosstie and rail replacement levels have been consistently below our benchmark of 2.5 percent and 2.0 percent respectively, except for 1978. It should be noted that secondhand ties were included in the number of ties replaced and there were 371,306 such ties installed during 1978. Secondhand ties have a shorter life than new ties, thus skewing our 2.5 percent benchmark for tie life.

Crosstie and rail replacement—CNW

	Crossties replaced		Rail replacement—miles of track	New rail laid—miles of track
	Actual	Percent of of total ties		
1978	950,127	2.50	344	147
1977	847,190	2.29	243	60
1976	690,177	1.81	173	5
1975	596,629	1.54	177	26
1974	814,237	2.06	226	47
1973	595,655	1.50	218	0.01

The condition of the track, as indicated by miles of track under slow order, is rather poor. CNW reported 7,697 miles of track or approximately 60 percent of its entire system under slow order as of December 31, 1978, slightly below the 7,923 miles reported as of June 30, 1974. In 1978 about 68 percent of its track that handles more than 5 million GTM per year was under slow order. Slow orders of that magnitude could interfere with operations.

Maintenance of equipment

	Actual	As a percent of operating revenue	In 1967 dollars
	Thousands		*Thousands*
1977	$96,695	17.2	$39,743
1976	88,972	16.8	39,368
1975	82,128	17.9	40,239
1974	81,539	16.8	45,149
1973	70,185	16.8	42,511

CNW's maintenance-of-equipment expense in current dollars has risen annually since 1973. However, considered on a constant dollar basis, a decline is evident.

While maintenance expense was in line with western district averages, it appears that either CNW's expenses were significantly higher on average than western district or else the funds were not effectively spent. The percent of revenue freight cars in unserviceable condition to those owned is quite high. As of January 1, 1979 CNW's bad order ratio was 15.6 percent, significantly worse than the western district's 6.5 percent or the class I average of 7.0 percent as of the same date. Such a high bad order ratio could cause the carrier to have difficulty in supplying freight cars to customers.

Deferred maintenance and delayed capital improvements are rather high. The amounts reported as of December 31, 1978 (and the increase over amounts reported for June 30, 1974) are: deferred maintenance—road, $618.8 million (9-percent increase); deferred maintenance—equipment, $41.2 million (127-percent increase); delayed capital improvements—road, $330.6 million (66-percent increase); and delayed capital improvements—equipment, $101.0 million (17-percent increase).

Operations.—

Selected data on operations—CNW

	Average haul	Ton-miles	Average revenue per ton-mile	Operating ratio	Transportation expenses as a percent of gross revenue
	Miles	*Thousands*	*Cents*		
1978	291	24,514,663	2.38	[1]99.74	N/A
1977	297	22,691,649	2.22	81.51	42.0
1976	290	22,969,087	2.06	79.78	42.7
1975	286	21,632,029	1.90	84.55	45.9
1974	308	24,893,468	1.74	82.21	44.1
1973	302	24,254,232	1.53	78.61	42.4

[1]Not comparable to prior years.

The carrier's average haul declined from 1974 to 1978 while the trend for both total class I and western district carriers was a healthy increase. CNW's 2.38 cents per ton-mile for 1978 compares favorably with the United States average of 2.37 cents and the western district's 2.15 cents per ton-mile. However, CNW's operating expenses are high and its ratio of transportation expense to operating revenues is worse than both the United States and western district averages.

Operating efficiency—CNW

	Net ton-miles per average train-mile	Loaded freight car-miles to total car-miles	Average net ton-miles per serviceable freight car-day	Freight miles per active locomotive unit per day
		Percent		
1978	1.925	56.5	1.569	142
1977	1.909	55.9	1.553	128
1976	1.836	52.5	1.420	142
1975	1.746	51.4	1.212	172
1974	1.704	54.1	1.301	205
1973	1.768	55.4	1.296	209

Net ton-miles per average train-mile, which measures the efficient use of trains, increased during the study period. The increase was caused in part by a decrease in train-miles and an increase in the number of freight cars per train. Also influencing this measure is the increase in loaded freight car-miles to total car-miles. Average net ton-miles per serviceable freight car-day indicates better usage of freight cars in more recent years in spite of a declining haul. This appears to be so because of a decline in the actual number of serviceable cars while the ton-miles carried are about the same in 1973 as 1978. The efficient use of locomotive units has declined significantly, from 209.4 miles in 1973 to 142.3 in 1978.

Two efficiency measures, net ton-miles per average train-mile and loaded freight car-miles, to total car-miles, had trends similar to western district carriers, yet CNW's results were below that of the western district average. CNW's performance as it relates to average net ton-miles per serviceable freight car-day and freight-miles per active locomotive unit per day was significantly below western district averages.

Net income.—CNW's net railway operating income has been positive 8 of the 11 reported years. Those amounts, though positive, have fluctuated greatly with no apparent upward trend. Net income after fixed charges and other deductions was negative 8 of the 11 study years, ranging from a loss of $18.8 million in 1969 to a gain of $15.3 million in 1973. This trend has not improved for CNW, which experienced a loss of $15.9 million in 1978. CNW reported its lowest operating ratio of 77.3 percent during the final 7 months of 1972, while its highest (worst) operating ratio was in 1969 (88.0 percent). This does not take into account 1978's operating ratio of 102 percent due to the change in composition of railway operating expense. This compares with a composite operatio ratio for all class I line-haul railroads of 96.7 percent in 1978.

Working capital.—For the study period, CNW had an inadequate working capital ratio in 7 of the 11 years, with an average monthly working capital requirement of $32.3 million. For the same period, the carrier's average current assets did not exceed average current liabilities. Its average working capital ratio was 0.94. By far, the largest deficit occurred during 1978, when the carrier had a working capital deficit of $50 million. This was primarily attributable to inclement weather combined with the inclusion of long-term debt due within 1 year in current liabilities.

Rate of return.—During 3 of the reported 11 years, the CNW's return on net investment has been negative. The carrier's average ROI for the years that it was positive net railway operating income averaged 3.0 percent. This compares with an average for all class I's in the western district in 1978 of 4.40 percent. Discretion should be used in comparing the carrier to other district carriers due to the sale of the CNW to its employees and the subsequent decrease in the amount of transportation property carried on its books. This conversion is evident in comparing CNW's 1971 investment in transportation property of $1 billion to its $271 million investment in 1972. This ledger charge resulted in the carrier doubling its ROI in 1971 from 2.04 percent to 5.72 percent in 1972 on similar net railway operating income earned.

Long-term debt.—Long-term debt due within 1 year increased annually from 1968-76; it subsequently declined in both 1977 and 1978. Long-term debt due after 1 year increased from $229.7 million in 1968 to $307.0 million in 1977, with the largest increase occurring in 1976.

Debt-equity ratio.—Analysis of the carrier's long-term debt-to-shareholder's equity ratio is deceptive, considering the changes that occurred during the 1971-72 period. Comparing the carrier's ratio during two time frames (1968-71 and 1972-78) discloses that the ratio ranged between 27.6 to 34.0 percent during the former period and 89.3 to 96.7 percent during the latter.

Since the equity base was drastically reduced in 1972, it has gradually increased with the exception of 1975, the height of the recession.

Fixed charges.—CNW did not have sufficient income available for fixed charges in 6 of the 11 years recorded. The average overall coverage was 0.86 which indicated that the carrier had difficulty in meeting its fixed charges and in some instances funds probably had to be diverted from other internal sources, such as debt or depreciation.

Net rents.—Net rents for 1977 were $40 million, a decrease from the high of $41 million in 1975. The carrier has continually had negative amounts (debits) of net rents, ranging from a low of $17.2 million owed to $41 million owed in 1975. This increase in net rents is coupled with a 27.4-percent decrease in total car fleet during the period 1971-78 while the aggregate capacity decreased 10.7 percent.

Estimated losses due to diversions.—The applicants have estimated that CNW would loose approximately $1.9 million in gross freight revenues or 0.36 percent of 1976 total operating revenues as a result of the proposed merger. The applicants also estimate that CNW's net revenue loss would be about $18,035. CNW disagrees in respect to both of the applicants' estimates. CNW believes that they will suffer a loss of $2.5 million in gross freight revenues and $2.0 million in net revenues because of the merger.

In our opinion CNW would lose no more than $2.5 million in gross freight revenues, which would translate into a net revenue loss of approximately $1.7 million.

There is the possibility that CNW could benefit from the deterioration in the service provided by Rock Island and Milwaukee Road. Also CNW could possibly participate in BN's coal traffic from the Powder River Basin going east.

CRV—income items, dividends, 1968-78

	1978[1]	1977	1976	1975	1974	1973	1972[2]	1971	1970	1969	1968
					Thousands						
Total railway operating revenues---	$652,563	$562,700	$529,200	$459,047	$484,857	$416,681	$216,432	$338,393	$313,928	$285,982	$275,771
Total railway operating expenses---	650,835	458,663	422,195	384,706	394,928	325,435	167,337	272,401	255,205	251,587	235,597
Net railway operating income-------	2,190	16,903	21,178	(4,506)	7,401	22,117	16,587	13,552	8,504	(18,372)	(2,312)
Income available for fixed charges-	10,300	24,973	28,168	5,538	19,368	29,395	18,640	17,634	17,501	(9,332)	11,055
Fixed charges----------	26,665	25,284	24,970	21,712	20,228	16,423	9,787	16,258	16,788	13,178	11,209
Total extraordinary items and accounting changes----------	-0-	-0-	-0-	-0-	-0-	2,411	2,819	(12,885)	(5,065)	3,857	471
Net income----------	(15,910)	(460)	3,050	(16,323)	(983)	15,260	11,600	(11,631)	(4,474)	(18,779)	(92)
Dividends appropriated----------	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	15	19,346
Provisions for deferred taxes------	(603)	(242)	793	(4,985)	(2,069)	--------	--------	--------	--------	--------	--------
Undistributed earnings----------	-0-	-0-	-0-	(2,078)	2,177	--------	--------	--------	--------	--------	--------
Restated net income[3]----------	(16,513)	(702)	3,843	(19,230)	(5,229)	--------	--------	--------	--------	--------	--------

[1]As of January 1, 1978, the Uniform System of Accounts was revised. Railway operating expense for 1978 is not comparable to prior years.

[2]Data for 1972 is for 7 months ending December 31, 1972.

[3]Net income was restated for comparative purposes by excluding provision for deferred taxes and undistributed earnings from affiliated companies.

CRV—working capital, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total current assets----------	$135,631	$122,258	$111,619	$94,632	$104,396	$114,363	$93,329	$85,599	$86,326	$77,896	$70,655
Total current liabilities----------	[1]185,594	129,861	124,993	113,996	96,998	87,724	75,679	83,336	88,534	89,411	91,785
Working capital----------	(49,963)	(7,603)	(13,374)	(19,634)	7,398	26,639	17,650	2,263	(2,208)	(11,515)	(21,130)
Total operating expenses----------	650,835	458,663	422,195	384,706	394,928	325,435	167,337	272,401	255,205	251,587	235,597
Property depreciation----------	2,259	1,361	1,029	706	407	206	81	6,211	6,523	6,040	5,800
Equipment depreciations----------	17,736	18,962	19,057	16,701	14,450	12,711	7,280	17,151	18,845	17,058	16,827
Net rents----------	([2])	(39,592)	(38,526)	(40,840)	(40,783)	(36,565)	(17,227)	(27,655)	(25,908)	(29,717)	(19,498)
Payroll and other railway taxes excluding income taxes----------	([3])	47,784	46,508	43,011	43,942	32,522	26,238	24,784	24,364	23,049	22,987
Operating expenses less depreciation plus net rents and taxes----	630,840	525,716	487,146	451,150	464,796	381,605	203,439	301,478	280,109	281,255	255,455
Monthly average working capital requirement----------	52,570	43,810	40,596	37,596	38,733	31,800	16,953	25,123	23,342	23,438	21,288
Working capital ratio----------	0.73	0.94	0.89	0.83	1.08	1.30	1.23	1.03	0.97	0.87	0.77

[1]Equipment obligations and other long-term debt due within 1 year are included in total current liabilities for 1978. Prior to 1978 they were not included.

[2]Net rents are included in operating expenses for 1978.

[3]Taxes are included in operating expenses for 1978.

CBN—rate of return on net investment in transportation property, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Investment in transportation property	$507,583	$489,998	$500,402	$396,190	$359,369	$306,783	$270,742	$1,011,750	$1,044,600	$1,044,268	$1,028,402
Cash	9,680	14,629	17,349	5,705	5,091	4,779	6,744	7,871	7,646	6,876	9,301
Material and supplies	41,987	35,765	34,527	32,313	39,344	28,487	21,945	21,556	18,658	17,008	14,190
Depreciation and amortization	124,217	106,054	100,755	60,067	38,628	23,069	9,649	378,247	385,326	372,656	369,102
Net investment	435,033	434,329	451,523	374,141	365,176	316,980	289,782	662,930	685,578	695,497	682,791
Net railway operating income	2,190	16,903	21,178	(4,506)	7,401	22,117	16,587	13,552	8,504	(18,372)	(2,312)
Net railway operating income as a percent of net investment	0.50	3.89	4.69	-0-	2.06	6.98	5.72	2.0%	1.24	-0-	-0-

CBN—debt structure, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Long-term debt due within 1 year	$36,388	$37,543	$38,272	$28,099	$24,591	$22,012	$20,906	$19,108	$17,643	$15,158	$14,511
Long-term debt due after 1 year	1326,701	306,990	325,069	275,323	281,228	259,189	252,507	253,462	265,178	263,160	229,724
Total stockholders' equity	28,742	21,235	12,425	9,375	25,698	30,502	15,242	410,878	422,510	426,940	445,144
Debt-equity ratio	91.9	93.5	96.3	96.7	91.6	89.3	94.3	27.6	38.6	38.1	34.0

[1]Long-term debt due after 1 year for 1978 is not comparable to prior years.

MISSOURI-KANSAS-TEXAS RAILROAD

MKT's financial position has been poor for more than 10 years. In fact, the net income of $2.4 million reported for 1978 was only the second significant income for this carrier in nearly 75 years. The other income was $3.2 million reported in 1969. However, if it were not for an income tax credit in 1978 and an extraordinary item in 1969 both years would have reflected losses. The carrier has had a negative working capital position for over 10 years. The average working capital ratio for the 10 years from 1968-77 was a low 0.72. In only 3 years since 1968 has MKT reported a positive rate of return and only in 1978 was the return significant.

MKT's debt-to-debt plus equity ratio has been over 100 percent since 1972, with annual decreases in stockholders' equity, which was a negative $27.9 million. With such a high ratio it would be difficult for the carrier to borrow from the open market. MKT has been successful in seeking Federal funds. In 1975 MKT borrowed $19.0 million for rehabilitation from USRA. MKT has also received approval from FRA for $22.5 million as of June 1979 for rehabilitation. As of November 1979 the carrier drew down $19.0 million from FRA funds.

Payments received by MKT from Katy Industries under the tax allocation agreement are remitted, upon receipt, to USRA to be applied to the unpaid installments of principal in the reverse order of maturity.

Maintenance.—From June 30, 1974 to December 31, 1978, MKT's delayed capital improvements—road increased by 12 percent to $19.7 million, while deferred maintenance—road decreased from $50.2 million to $48.2 million. Deferred maintenance—equipment decreased from $11.3 million to $6.6 million and delayed capital improvements—equipment decreased from $19.3 million to $11.4 million.

Maintenance-of-way—MKT

	Actual	Per equated track-mile	As a percent of operating revenues	Per equated track-mile in 1967 dollars
	Thousands			
1977	$19,350	$9,458	16.5	$3,887
1976	16,220	7,360	16.0	3,257
1975	12,011	5,329	13.3	2,611
1974	11,950	5,201	12.8	2,888
1973	11,656	5,052	12.9	3,060

MKT has been pursuing an aggressive maintenance program in recent years. Maintenance-of-way-and-structures expenditures have increased significantly in both current and constant dollars since 1976. MKT's maintenance-of-way ratio was below the western district average from 1972 until 1976. The large increase in expenditures is primarily due to the infusion of Federal funds.

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Crosstie and rail replacement—MKT

	Crossties replaced		Rail replacement—miles of track	New rail laid—miles of track
	Actual[1]	Percent of total ties		
1978	260,344	3.64	61	44
1977	206,129	2.66	58	48
1976	251,812	3.25	77	66
1975	181,403	2.29	15	-0-
1974	141,025	1.74	16	-0-
1973	208,551	2.56	19	5

[1]Includes some secondhand ties: in 1978, 2,609; 1977, 35,876; 1976, 144,549; 1975, 44,140; 1974, 8,939; and 1973, 6,019.

Actual crosstie replacement has been in line with our benchmark and has averaged 2.69 percent from 1973 to 1978. However, a substantial amount of secondhand ties were installed for the three years 1975-77. Thus the 2.5-percent benchmark would be on the low side. In the previous decade there was a decline in crosstie replacement from 1964 until the recent increase of the late 1970's. Rail replacement has been low. In only one year, 1977, has our benchmark of 2.0 percent replacement been reached. Most of the other years have been rather low, with 1978 and 1977 slightly below 2.0 percent.

MKT's reported 404 miles of its system (about 28 percent) under slow order as of December 31, 1978. This condition represents a decrease of 33 percent from the number of miles under slow order on June 30, 1974.

Maintenance of equipment—MKT

	Actual	As a percent of operating revenue	In 1967 dollars
	Thousands		*Thousands*
1977	$14,754	12.59	$6,064
1976	14,141	13.98	6,257
1975	11,527	12.81	5,648
1974	12,079	12.93	6,688
1973	11,646	12.95	7,054

Maintenance-of-equipment expenditures have declined since 1973 when viewed in constant dollars. This trend can be traced to the mid-1960's. Maintenance-of-equipment expenditures as a percent of operating revenue have been significantly below both western district and class I averages. This trend also extends back to the mid-1960's.

MKT's ratio of revenue freight cars in unservicable condition to total ownership has improved from 15.8 percent at the beginning of 1977 to 9.2 percent. During the same

period there was a decrease of approximately 5 percent in cars owned. Also, since early 1978 the carrier has been repairing more heavily damaged cars per month then previously.

Deferred maintenance has decreased somewhat from June 1974 levels to yearend 1978 levels. Yet there are still substantial levels, with deferred maintenance of $54.8 million and delayed capital improvements of $31.1 million remaining.

Operations

Selected operational data—MKT

	Average haul	Ton-miles	Average revenue per ton-mile	Operating ratio	Transportation expense as a percent of gross revenue
	Miles	*Thousands*	*Cents*		
1978	333	5,817,716	2.22	'99.36	N/A
1977	321	5,370,601	2.09	76.91	38.6
1976	325	4,858,692	1.99	78.76	38.9
1975	334	4,671,977	1.85	77.38	41.1
1974	365	5,541,372	1.59	76.85	42.2
1973	371	6,111,510	1.40	74.55	42.0

'Not comparable to prior years.

MKT's average haul for 1978 was 333 miles, reflecting its first increase since 1973. The carrier's freight ton-miles have increased significantly from the 1975 low, yet ton-miles are still below the 1973 high. For 1978 MKT's average revenue per ton-mile has risen slightly above the western district average. The carrier's operating ratio indicates that MKT has not been spending as large a percent of its operating revenues for operating purposes as the western district average.

Operating efficiency—MKT

	Net ton-miles per average train-mile	Loaded freight car-miles to total car-miles	Average net ton-miles per service freight car-day	Freight-miles per active locomotive unit per day
		Percent		
1978	2,074	55.0	1,728	207.8
1977	1,979	54.1	1,667	210.3
1976	1,924	53.0	1,556	205.8
1975	1,872	52.6	1,264	205.8
1974	2,021	55.6	1,606	236.2
1973	2,041	56.2	1,582	242.4

One efficiency indicator, net ton-miles per average train-mile, has increased to 2,074 for 1978, which is better than the western district average. While the other indicators are below western district averages for 1978, they all show improvement from prior years.

MKT's operations have improved in recent years because of its concentration on maintenance and upgrading of its facilities. The maintenance program was about 60 percent complete in 1978 and is expected to be completed by 1981 or 1982.

MKT's freight revenues rose by over 15 percent in 1978 from the prior year's results and carloadings increased over 3 percent for the same period. Coal tonnage in 1978 increased over 15 percent from 1977 figures and substantial increases are expected in the near future. Unit-trains are now moving to the Lower Colorado River Authority (CRA) powerplant and a second unit is due to come on stream in early 1980. The Grand River Dam Authority project is progressing with shipments expected in early 1981. Both of these plants are served exclusively by MKT and have claimed potential of using 2 million tons per unit. Also another LCRA unit was recently announced which may use Texas lignite, much of which lies along MKT's line. There are also good prospects for significant and sustained movements of crushed stone and chemicals.

Net income.—Over the past 11 years, MKT's operating revenues have more than doubled, from $65 million in 1968 to $135 million in 1978. Railway operating revenue has increased in all years with the exception of 1975, a recession year. While revenues have increased, expenses have maintained a steady percentage of revenues. During the period 1968-76, the operating ratio has ranged from a low of 73 percent in 1971 to a high of 79 percent in 1976.

Net railway operating income has been inadequate for MKT as evidenced by its negative returns in 8 of the 11 years under study. The only positive results were reported in 1978, 1977, and 1971. NROI would have also been negative in 1977 and reduced below $1 million in 1978 had not MKT received a tax credit pursuant to an agreement with its parent.

Net income has not been sufficient to adequately increase the carrier's equity base. Losses for 8 of 11 years graphically portrays this trend.

Federal income tax credits have accrued to MKT under a tax benefit allocation agreement with its parent, Katy Industries, Inc.

No dividends have been paid by MKT during the study period.

Working capital.—MKT has had a negative working capital position in every year since 1968. For the period 1968 to 1977 the carrier's current liabilities exceeded current assets by $59.1 million for an average working capital ratio of 0.72. If the current liabilities for 1978 are adjusted for comparability with prior years by removing long-term debt due within 1 year, the working capital ratio would be 0.97 for 1978.

Rate of return.—MKT's investment in transportation property exclusive of depreciation has had a downward trend during the earlier years under study and has increased slightly in recent years. A positive rate of return was reported in only three years: 3.70 percent in 1978, 1.20 percent in 1977 and 0.64 percent in 1971.

Long-term debt.—MKT's long-term debt due within 1 year has remained fairly constant except for the years 1978 ($8.2 million), 1975 ($14.5 million), and 1968 ($13.3 million). With the exception of 1978, 1971, and 1969, MKT has been unable to generate funds from net income to reduce debt levels and therefore found it necessary to use funds generated by cash flow.

Debt-equity ratio.—MKT's ratio of long-term debt to combined debt and stockholders' equity has been in excess of 100 percent in every year since 1972. Prior

to that time, the ratio never dropped below 92 percent. The carrier's history of net losses resulted in erosion of its stockholders' equity, which has been negative since 1972.

Fixed charges.—MKT has had a continual problem generating sufficient income to meet fixed changes. Only in 1971, did income available for fixed changes exceed the fixed charges due. During the study period fixed changes averaged $3.7 million while income available for fixed changes has averaged only $630,000.

Net rents.—Net rents were negative for all years under study. The gradual trend has been upward. During the 8-year period, MKT's total car fleet decreased by 31.1 percent while the aggregate capacity for the units increased by 39.9 percent.

Estimated losses due to diversions.—The applicants have estimated that MKT would lose approximately $6.5 million in gross freight revenues or 6.46 percent pecent of its 1976 total operating revenues as a result of the merger. The applicants estimate that the net revenue loss after giving consideration to possible savings would be about $1.4 million. MKT disagrees with the applicants and contends that its gross freight revenue loss would be approximately $11.6 million while its net revenues loss would be about $6.1 million.

We believe that MKT could reasonably be expected to suffer a gross revenue loss of approximately $8.75 million and a net revenue loss of approximately $4.53 million as a result of the proposed merger.

Conclusion.—In the past MKT has not performed well with losses reported in the most of the past 25 years. However, there has been an increased emphasis on rehabilitation of the system for the past several years. Prior years deficiencies cannot be overcome overnight, yet some beneficial results are evident from the increased maintenance program as follows: a decrease in miles of track under slow order, a decrease in the bad order ratio, a decrease in deferred maintenance and a more efficient operation as indicated by the efficiency indicators.

The management of MKT has painted a dire picture for itself the MKT if the proposed merger is consummated. While the carrier will no doubt be adversely affected by the loss of gross freight revenues of approximately $8.75 million we do not expect a loss of this magnitude to cripple the MKT and render it incapable of providing necessary service. Even with consummation of the merger MKT should produce a profit in 1981.

NET—income items, dividends, 1968-78

	1978[1]	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total railway operating revenues--	$135,676	$117,186	$101,123	$90,005	$93,305	$90,042	$78,968	$74,208	$69,406	$66,701	$64,593
Total railway operating expenses--	134,805	90,127	79,647	69,646	71,709	67,132	59,716	54,115	52,594	51,277	48,439
Net railway operating income------	6,959	2,124	(2,733)	(3,982)	(1,583)	(2,014)	(968)	1,208	(671)	(1,346)	(768)
Income available for fixed charges	2,779	3,454	(1,029)	(1,804)	306	(720)	236	2,788	827	(175)	282
Fixed charges----------	6,474	5,247	4,737	3,506	2,920	3,012	2,796	2,766	2,872	2,846	3,254
Total extraordinary items and accounting changes----------	-0-	-0-	-0-	-0-	-0-	(4,462)	-0-	-0-	(2,965)	6,180	-0-
Net income----------	2,405	(5,572)	(5,766)	(5,310)	(2,560)	(8,195)	(2,559)	21	(5,001)	3,158	(2,971)
Dividends appropriated----------	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-
Provision for deferred taxes------	-0-	-0-	-0-	-0-	-0-	------	------	------	------	------	------
Undistributed earnings----------	524	653	425	(397)	39	------	------	------	------	------	------
Restated net income[2]----------	1,881	(6,225)	(6,191)	(4,913)	(2,599)	------	------	------	------	------	------

[1]As of January 1, 1978, the Uniform System of Accounts was revised. Railway operating expense for 1978 is not comparable to prior years.

[2]Net income was restated for comparative purposes by excluding provision for deferred taxes and undistributed earnings from affiliated companies.

NET—working capital, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total current assets----------	$30,897	$21,172	$19,945	$18,827	$14,116	$14,427	$11,400	$11,948	$13,751	$11,594	$11,483
Total current liabilities---------	[1]39,911	25,827	24,773	23,330	23,076	20,686	17,827	16,475	17,333	15,887	22,551
Working capital----------	(9,014)	(4,655)	(4,828)	(4,503)	(8,960)	(6,259)	(6,427)	(4,527)	(3,582)	(4,293)	(11,068)
Total operating expenses----------	134,805	90,127	79,647	69,646	71,709	67,132	59,416	54,115	52,594	51,277	48,439
Property depreciation----------	1,056	982	970	942	924	942	960	959	1,004	973	956
Equipment depreciation----------	1,689	1,406	1,315	1,247	1,307	1,323	1,319	1,361	1,551	1,810	1,997
Net rents----------	[2](3)	(10,081)	(17,312)	(16,254)	(14,812)	(18,266)	(14,784)	(13,460)	(12,144)	(11,618)	(12,048)
Payroll and other railway taxes excluding income taxes----------	(3)	6,854	6,897	8,086	8,367	6,658	5,736	5,423	5,338	5,151	4,874
Operating expenses less depreciation plus net rents and taxes---	132,060	112,674	101,571	91,797	92,657	89,791	77,657	70,678	67,521	65,263	62,408
Monthly average working capital requirement----------	11,005	9,390	8,464	7,650	7,721	7,483	6,471	5,890	5,627	5,439	5,201
Working capital ratio----------	0.77	0.82	0.81	0.81	0.61	0.70	0.64	0.73	0.79	0.73	0.51

[1]Equipment obligations and other long-term debt due within 1 year are included in total current liabilities for 1978. Prior to 1978 they were not included.

[2]Net rents are included in operating expenses for 1978.

[3]Taxes are included in operating expenses for 1978.

MKT—rate of return on net investment in transportation property, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Investment in transportation property	$209,653	$196,188	$198,953	$195,186	$198,232	$203,405	$209,599	$214,482	$217,239	$220,899	$236,410
Cash	(1,051)	286	(2,073)	(958)	396	699	(602)	213	1,380	1,576	1,898
Material and supplies	9,003	9,030	9,919	6,135	5,032	3,620	3,516	3,528	3,156	2,979	3,310
Depreciation and amortization	29,667	27,864	27,291	26,154	24,773	26,478	26,682	28,896	29,396	32,303	33,858
Net investment	187,938	177,640	179,508	174,209	178,887	181,246	185,831	189,327	192,379	201,151	207,760
Net railway operating income	6,959	2,124	(2,733)	(3,982)	(1,583)	(2,014)	(968)	1,208	(671)	(1,346)	(768
Net railway operating income as a percent of net investment	3.70	1.20	-0-	-0-	-0-	-0-	-0-	0.64	-0-	-0-	-0-

MKT—debt structure, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Long-term debt due within 1 year	$8,245	$4,409	$2,835	$14,455	$4,732	$1,667	$1,294	$3,877	$973	$1,164	$13,332
Long-term debt due after 1 year	[1]221,551	123,169	117,952	98,726	102,260	106,960	104,856	103,502	107,252	107,944	109,703
Total stockholders' equity	(33,916)	(34,912)	(27,930)	(20,866)	(14,197)	(13,047)	(3,441)	528	1,916	8,337	6,590
Debt-equity ratio percent	118.1	139.6	131.0	126.8	116.1	113.9	103.4	99.5	98.2	92.8	94.3

[1]Long-term debt due after 1 year for 1978 is not comparable to prior years.

ILLINOIS CENTRAL GULF RAILROAD COMPANY

ICG's net income has declined from $45.1 million reported in 1973 to a loss of $2.0 million for 1978. In 1976 the carrier earned a $15.6 million net income with net revenues from operations of only $2.7 million. Contributing to the 1976 profit was nonoperating income of $43.8 million. The carrier's nonoperating income has been over $23 million since 1973, with the sale of real estate contributing most of this amount. ICG owns approximately $150 million of marketable real estate.

From 1974 to 1978 ICG has not had sufficient working capital equal to meet its monthly average working capital requirement. Its parent company monitors the carrier's cash and financial requirements closely and cash flows freely between parent and subsidiary on a daily basis. However, it seems reasonable to assume that there is a practical limit to how much assistance the parent would supply to the railroad, especially since the parent plans to eventually dispose of the railroad.

The carrier's rate of return was 0.25 percent in 1976 and has been below 1.00 percent since 1975. ICG has had a favorable debt-to-equity ratio of below 37 percent up until 1978. Its bonds were recently downgraded and with the carrier's poor earnings it would have difficulty in borrowing a significant amount of funds in the open market without its parent's guarantee.

Since September 1977, ICG has received FRA approval for $166.4 million of financing for track rehabilitation. As of October 21, 1979, ICG had drawn down $50.2 million from this source.

ICG reported a loss of $28.3 million for the first 9 months of 1979, as compared to a loss of $21.5 million for the comparable period in the previous year. The current loss included substantial maintenance expenses financed by Federal funds. Through the first 9 months of 1979, ICG received about $23.8 million in Federal act funds to help rehabilitate its track.

Maintenance.—From June 30, 1974 to December 31, 1978 ICG's deferred maintenance—road increased slightly (to $92.7 million) and delayed capital improvements—road increased 49 percent (to $215.2 million), both deferred maintenance—equipment and delayed capital improvements—equipment decreased, the former by 22 percent (to $7.9 million) and the latter by 3 percent (to $41.8 million).

Maintenance of way and structures—ICG

	Actual	Per equated track-mile	As a percent of operating revenue	Per equated train-mile in 1967 dollars
	Thousands			*Thousands*
1977	$124,780	$10,729	18.6	$4,410
1976	98,979	8,450	16.0	3,729
1975	78,145	6,596	14.3	3,232
1974	80,751	6,676	14.0	3,697
1973	72,409	5,944	13.8	3,600

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The expenditures both in current and constant dollars have risen from a low during recessionary 1975. The expenditures in most recent years have been bolstered by Federal funding. Maintenance expenditures as a percent of operating revenues have been in line with southern district and class I averages for the period 1973 to 1976; in 1977 ICG reported greater expenditures.

Since 1973 the tie replacement level has been in line with our 2.5-percent benchmark and has averaged 3.0 percent for the 6-year period. A 2.5-percent replacement level extends into the late 1960's. Rail replacement levels have only equaled our benchmark of 2.0 percent in 1 year since 1973. An average of 179 miles of track per year or 1.28 percent of the total system was replaced annually since 1973. New rail laid has averaged 82.5 miles of track per year or 0.92 percent of main line of the period 1973-78. Our measures could be influenced by the carrier deferring maintenance on low density lines and those lines marked for abandonment.

Crosstie and rail replacement—ICG

	Crossties replaced		Rail replacement—miles of track	New rail laid—miles of track
	Actual	Percent of total ties		
1978	$1,381,810	3.60	194	71
1977	1,336,222	3.42	392	179
1976	1,176,325	2.97	171	62
1975	941,983	2.36	96	60
1974	1,061,139	2.61	96	72
1973	1,214,363	2.98	127	51

ICG reported a total of 1,140 miles under slow order or approximately 8 percent of its system, at the end of 1978. As of the same date 14 percent of its trackage with an average annual traffic density of greater than 9 million GTM per mile was under slow order.

ICG has a program underway to abandon little-used and uneconomical portions of its systems. Since the beginning of 1978, ICG has been granted permission by the Commission to abandon 394 miles of track and has pending applications to abandon an additional 500 miles of track.

ICG's maintenance of equipment as a percent of operating revenues has been below the southern district and total U.S. average. Expenditures on a current dollar basis have risen in recent years. (See table below.) When viewed on a constant dollar basis the expenditures rose very slightly from recessionary 1975.

The bad order ratio at the start of 1979 was rather high, at 12.3 percent, while the ratio for the southern district was 7.0 percent and for total class I carriers 7.9 percent as of that date.

Maintenance of equipment—ICG

	Actual	As a percent of operating revenue	In 1967 dollars
	Thousands		*Thousands*
1977	$114,222	17.0	$46,947
1976	105,424	17.0	46,648
1975	94,300	17.2	46,203
1974	91,276	15.8	50,540
1973	81,537	15.5	49,386

Operations.—

Selected data on operations—ICG

	Average haul	Ton-miles	Average revenue per ton-mile	Operating ratio	Transportation expenses as a percent of gross revenue
	Miles	*Thousands*	*Cents*		
1978	345	33,997,724	2.10	[1]99.66	N/A
1977	317	30,196,521	2.06	82.23	40.1
1976	303	28,873,945	1.99	79.70	39.7
1975	293	26,751,105	1.91	81.76	42.6
1974	304	32,122,264	1.67	77.74	40.5
1973	333	34,103,275	1.44	75.18	38.1

[1]Not comparable to prior years.

Average haul has risen above the 1973 high and was 345 miles for 1978. Ton-miles have been increasing since recessionary 1975, yet are still slightly below 1973 figures while accounting for 20 percent of total southern district ton-miles. ICG's revenues per ton-mile is below both southern district and class I averages. This low revenue per ton-mile is influenced by the carrier's north-south traffic and intermodal competition. ICG's operating ratio and transportation ratio have been below southern district averages, yet they have been in line with class I averages.

Operating efficiency indicators are presented in the table below.

Operating efficiency—ICG

	Net ton-miles per average train-mile	Loaded freight car-miles to total car-miles	Average net ton-miles per service-able freight car-day	Freight miles per active locomotive unit per day
		Percent		
1978	2,086	54.8	1,820	156.3
1977	1,917	53.8	1,568	158.8
1976	1,835	52.6	1,474	160.2
1975	1,787	51.8	1,400	163.1
1974	1,833	54.4	1,548	175.5
1973	2,046	55.1	1,506	175.0

The percentage of loaded freight car-miles to total car-miles has gradually risen in recent years. Yet for 1978 ICG is below both southern district and class I averages. The efficient use of trains, as measured by net ton-miles per average train-mile, has increased in recent years and was better than both southern district and class I averages for 1978. Average net ton-miles per serviceable freight car-day measures the efficient use of freight cars. This measure indicates a significant increase for 1978 over the prior year. The reported 1,820 ton-miles per serviceable freight car-day for 1978 is better than both southern district and class I averages for the year. The last efficiency indicator in the table shows a decline in freight-miles per active locomotive unit per day since 1974. While this decline follows the trend for both the southern district and class I railroads, ICG's 1978 results are worse.

Net income.—ICG's railway operating revenues have grown from $401 million in 1968 to $749 million in 1978. These revenues increased yearly with the exception of recessionary 1975, when a decline of 5 percent was registered. The carrier's net railway operating income has fluctuated, with a generally decreasing trend for 1971 and 1973. In 1971 NROI increased over the prior year primarily because the carrier increased its gross revenues while controlling operating expenses and net rents. In 1973, the first full year after merger of the Gulf, Mobile & Ohio, gross revenues increased significantly while operating expenses were kept in check, with the carrier reporting its best operating ratio of the period. The apparent casues for the decreases in net railway operating income are substantial increases in net rents and a worsening of the operating ratio.

Net income has also decreased gradually from 1968 with the exception of 1973. Poor returns have been reported in recent years. Net income has been declining despite significant contribution from miscellaneous income which for the period 1968-78 averaged $16.2 million per year.

Working capital.—ICG has had a positive working capital position every year except 1975 and 1978. Working capital for 1978 is not comparable to prior years because of an accounting change and 1975 was a bad year for the economy. While the carrier did have positive working capital for 9 of the 10 years from 1968-77, the working capital ratio for the 10 years was 1.31, with a low of 0.91 in 1975 and a high of 1.79 in 1969. The monthly average working capital requirement has been greater than working capital since 1974.

Rate of return.—ICG has increased its investment in plant and equipment over $400 million during the past 11 years, while its rate of return has gradually decreased. During the study period the average annual rate of return was 2.18 percent with the average for the most current 4 years decreasing to 0.36 percent. This compares with an average 1978 return of 4.40 percent for the western district and a 4-year average of 3.58 percent.

Long-term debt.—Long-term debt due within 1 year has gradually increased, from $19.6 million in 1968 to $44.3 million in 1978. Since 1975, net income has been insufficient to cover the majority of the debt, and the carrier has been forced to seek other sources of meeting this obligation. Long-term debt due after 1 year has increased from $309 million in 1968 to $387 million in 1977, with the largest increase occurring during the 1973-74 period when debt increased $51 million.

Debt-equity ratio.—The carrier's debt-equity ratio ranged from a high of 43.9 percent in 1978 to a low of 28.6 percent in 1971. The 1978 ratio of 43.9 percent is not comparable to the prior years. If it were adjusted for comparability with prior years, the ratio would be 36.3 percent.

Fixed charges.—ICG had no problem in meeting its fixed charges from 1968 to 1977. Only in 1978 was the income available for fixed charges not sufficient to cover fixed charges. Average income available for fixed charges were $22.0 million. Therefore, the fixed charge coverage was greater than two times.

Net rents.—Net rents averaged $35.2 million (debit) for the period 1968-77. The net rents for 1977 were $62.8 million (debit). The primary cause for the increase in rents payable was the significant increase in recent years in the gross amount payable on cars of individuals and companies not carriers.

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ICG—income items, dividends, 1968-78

	1978[1]	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total railway operating revenues	$748,662	$671,671	$619,724	$547,449	$577,843	$525,993	$472,606	$458,504	$442,322	$422,388	$400,718
Total railway operating expenses	746,104	552,448	493,902	447,592	449,220	395,442	373,440	355,749	346,525	330,090	313,949
Net railway operating income	3,181	1,174	2,727	9,028	24,095	42,757	27,444	35,938	29,552	31,762	26,321
Income available for fixed charges	37,480	34,129	43,312	31,021	47,408	67,430	43,938	48,640	48,821	45,602	40,289
Fixed charges	37,781	29,370	28,415	28,561	24,439	20,223	14,235	15,086	16,481	14,362	13,129
Total extraordinary items and accounting charges	-0-	-0-	1,368	-0-	8,448	-0-	349	(13,803)	-0-	6,390	9,740
Net income	(1,872)	3,339	15,227	1,080	29,474	45,132	27,937	18,631	30,222	25,510	34,778
Dividends appropriated	1	-0-	-0-	6,547	15,650	18,353	36,930	15,094	15,015	14,540	13,652
Provision for deferred taxes	-0-	-0-	1,783	(245)	3,512	--------	--------	--------	--------	--------	--------
Undistributed earnings	(566)	1,665	2,024	2,535	589	--------	--------	--------	--------	--------	--------
Restated net income[2]	(1,406)	1,674	14,985	(1,700)	32,397	--------	--------	--------	--------	--------	--------

[1]As of January 1, 1978, the Uniform System of Accounts was revised. Railway operating expense for 1978 is not comparable to prior years.

[2]Net income was restated for comparative purposes by excluding provision for deferred taxes and undistributed earnings from affiliated companies.

ICG—working capital, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total current assets	$179,620	$159,134	$130,502	$120,203	$169,655	$157,105	$137,097	$152,770	$161,079	$145,259	$121,985
Total current liabilities	[1]216,417	151,499	129,405	132,264	136,144	104,442	102,802	100,421	98,089	81,252	75,370
Working capital	(36,797)	7,635	1,097	(12,061)	33,511	52,663	34,295	52,349	62,990	64,007	46,615
Total operating expenses	746,104	552,448	493,902	447,592	449,220	395,442	373,440	355,749	346,525	330,090	313,949
Property depreciation	6,728	6,700	5,725	5,442	6,183	5,965	6,419	6,571	6,351	6,162	6,074
Equipment depreciation	29,814	21,704	21,579	21,363	18,796	16,626	21,257	21,858	22,556	22,803	22,029
Net rents	(2)	(62,800)	(57,081)	(34,916)	(39,645)	(35,195)	(26,953)	(26,161)	(25,461)	(21,609)	(22,612)
Payroll and other railway taxes excluding income taxes	([3])	55,449	64,231	57,848	61,368	48,854	39,253	30,250	29,584	27,571	27,751
Operating expenses less depreciation plus net rents and taxes	710,362	642,293	587,910	513,551	525,254	457,160	411,970	383,731	372,663	350,305	336,209
Monthly average working capital requirement	59,197	53,524	48,992	42,796	43,771	38,092	34,331	31,978	31,055	29,192	28,017
Working capital ratio	0.83	1.05	1.01	0.91	1.25	1.50	1.33	1.52	1.64	1.79	1.62

[1]Equipment obligations and other long-term debt due within 1 year are included in total current liabilities for 1978. Prior to 1978 they were not included.

[2]Net rents are included in operating expenses for 1978.

[3]Taxes are included in operating expenses for 1978.

ICG—rate of return on net investment in transportation property, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Investment in transportation property	$1,461,155	$1,440,926	$1,397,394	$1,397,433	$1,409,451	$1,336,951	$1,306,570	$1,103,555	$1,100,947	$1,085,573	$1,044,498
Cash	(14,661)	(13,713)	(11,784)	(43)	2,111	5,391	1,222	7,408	8,224	4,431	7,710
Material and supplies	43,084	46,193	28,492	27,497	32,086	21,053	19,824	18,189	18,142	15,657	16,711
Depreciation and amortization	333,110	323,568	323,694	324,108	356,612	360,516	356,961	330,006	320,195	310,096	300,979
Net investment	1,156,468	1,149,838	1,090,408	1,100,779	1,087,036	1,002,879	970,655	799,146	807,118	795,565	767,998
Net railway operating income	3,181	1,174	2,727	9,028	24,095	42,757	27,444	35,938	29,552	31,762	26,321
Net railway operating income as a percent of net investment	0.28	0.10	0.25	0.82	2.22	4.26	2.83	4.50	3.66	3.99	3.43

ICG—debt structure, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Long-term debt due within 1 year	$44,280	$33,222	$32,180	$31,260	$30,569	$43,659	$22,799	$20,504	$20,727	$20,467	$19,610
Long-term debt due after 1 year	[1]535,551	386,539	375,211	365,042	383,957	332,624	330,692	307,833	323,784	333,219	308,915
Total stockholders' equity	682,190	692,559	676,860	665,337	670,803	742,620	713,914	767,424	761,973	746,868	723,118
Debt-equity ratio (percent)	43.9	35.8	35.7	35.4	36.4	30.9	31.7	28.6	29.8	30.9	29.9

[1]Long-term debt due after 1 year for 1978 is not comparable to prior years.

SOO LINE RAILROAD COMPANY

Soo Line has been consistently profitable and reported a net income of $16.2 million for 1976 on railway operating revenues of $189.3 million. The carrier's working capital position has been very good with more than sufficient funds to cover the monthly average working capital requirement. The working capital ratio for Soo Line has been at least 1.70 since 1968, with a ratio of 1.98 for 1976. Soo Line's net railway operating income as a percent of net investment average of 4.9 percent from 1968 to 1976 with a 6.04-percent return for 1976. Its debt-to-equity position has been strong, with its debt-equity ratio continually under 40.0 percent between 1968 and 1976.

Maintenance.—In 1974 Soo Line reported no deferred maintenance or delayed capital improvements. At the end of 1978 it reported delayed capital improvements—road of $8.9 million, delayed capital improvements—equipment of $28.3 million and no deferred maintenance of either road or equipment.

Maintenance of way and structures has risen annually, with the exception of recessionary 1975. The same trend is evident on an equated track-mile basis. In constant 1967 dollars, maintenance per equated track-mile followed the same trend as in current dollars, except expenditures for 1976 and 1977 are below those for 1973 and 1974.

Maintenance of way and structures—Soo Line

	Actual	Per equated track-mile	As a percent of operating revenue	Per equated track-mile in 1967 dollars
	Thousands			
1977	$37,970	$7,596	17.48	$3,122
1976	32,364	6,439	17.10	2,849
1975	26,984	5,380	16.00	2,636
1974	29,267	5,831	16.28	3,229
1973	26,732	5,326	15.88	3,226

Maintenance-of-way-and-structures expenditures as a percent of operating revenues have been good, ranging from 15.88 percent to 17.48 percent. In each year from 1973 to 1977, Soo Line's maintenance ratio has been better than both the United States and western district averages.

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Crosstie and rail replacement—Soo Line

	Crossties replaced		Rail replacement—miles of track	New rail laid—miles of track
	Actual	Percent of total ties		
1978	343,615	2.18	160.02	66.75
1977	317,282	2.03	152.81	62.59
1976	274,775	1.74	130.12	49.77
1975	292,240	1.36	84.47	28.35
1974	231,915	1.47	235.65	88.45
1973	213,780	1.35	331.05	156.36

Crosstie replacement for 1976-78 has been 2 percent or better. The 6-year average from 1973-78 was 1.7 percent. While prior years' replacement was below our benchmark we do not have reason to be concerned since the carrier provides good service. An explanation of a low replacement level could be a maintenance program which concentrates on lines of high density.

Rail replacement has averaged over 3.0 percent of total miles for the period 1973 to 1978. From 1972 to 1978 a total of over 1,200 miles of track has been replaced or approximately 20 percent of total miles.

Miles of track under slow order is an indication of how effective the carrier's maintenance-of-way-and-structures program is. As of December 31, 1978, Soo Line had 1,067 miles under slow order. However, there were no slow orders on track with at least 20 million GTM per year and only 2.5 percent of the trackage with 5 to 20 million GTM per year was under slow order.

Maintenance of equipment ranged from 12.14 percent of operating revenues in 1973 to 12.76 percent in 1977. In each year since 1973 Soo Line's ratio has been below that of the total class I and western district ratios. When viewed in 1967 dollars the expenditures for 1977 represent a decline from 1973 and 1974 expenditures.

Revenues freight cars in unserviceable condition are directly related to maintenance expenditures. Soo Line's bad order ratio total has improved from 14.5 percent at the start of 1977 to 8.9 percent at the beginning of 1979. Soo Line's beginning 1979 ratio is worse than the United States ratio of 7.9 percent and the western district ratio of 6.5 percent.

Maintenance of equipment—Soo Line

	Actual	As a percent of operating revenue	In 1967 dollars
	Thousands		*Thousands*
1977	$27,731	12.76	$11,398
1976	22,598	11.93	9,999
1975	19,457	12.07	9,533
1974	22,827	12.69	12,640
1973	20,428	12.14	12,373

Operations.—

Selected operations data—Soo Line

	Average haul	Ton-miles	Average revenue per ton-mile	Operating ratio	Transportation expenses as a percent of gross revenue
	Miles	*Thousands*	*Cents*	*Percent*	
1978	425	10,940,680	2.24	'84.85	N/A
1977	420	10,168,596	2.08	68.98	23.6
1976	416	9,395,695	1.99	69.08	33
1975	401	8,453,468	1.89	71.19	35
1974	319	10,590,725	1.65	69.50	34
1973	409	11,325,189	1.50	68.32	34

'Not comparable to prior years.

From recessionary 1975 Soo Line's ton-miles increased 23 percent to 10.9 billion ton-miles for 1978 and extended the average haul to 425 miles in 1978. The carrier has been able to control operating expenses rather well, with a reported ratio of 68.98 percent. Soo Line's operating ratio has been significantly below that ratio for class I railroads and the western district since 1973. The carrier's transportation ratio has also been consistently below class I and the western district ratios.

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Operating efficiency—Soo Line

	Net ton-miles per average train-mile	Loaded freight car-miles to total car-miles	Average net ton-miles per serviceable freight car-day	Freight-miles per active 1,000-unit/day
		Percent		
1978	2,344	54.0	2,395	174.1
1977	2,312	53.9	2,215	175.3
1976	2,226	53.6	2,027	172.1
1975	2,179	53.2	1,883	167.5
1974	2,067	55.5	2,117	188.5
1973	1,966	56.9	2,094	214.3

Net ton-miles per average train-mile indicates the carrier's efficiency in freight train usage. Soo Line has consistently reported an amount better than both the average of class I railroads and the western district average. Both loaded freight car-miles to total car-miles and average net ton-miles per serviceable freight car-day measure the carrier's efficient freight car usage. Soo Line has become more efficient since 1975 as indicated by those two measures. Soo Line has reported slightly lower results in loaded freight car-miles to total car-miles than the results of total class I railroads and western district averages. Soo Line's performance as it relates to average net ton-miles per serviceable freight car-day was slightly superior to the western district average and significantly better than that of total class I railroads. Locomotive performance is indicated by the freight car-miles per active locomotive unit per day measurement. This measure indicates that Soo Line's performance is lightly below the class I average and significantly below the western district average.

Net income.—Total railway operating revenues have grown yearly since 1968, with the exception of recessionary 1975. The operating ratio ranged from 69.0 percent in 1977 to 75.6 percent in 1969.

Net railway operating income has steadily increased, from $8.8 million in 1968 to $25.8 million in 1978. Net income followed a similar pattern, peaking at $23.3 million in 1978.

Working capital.—Soo Line has had a positive working capital position since 1968, with average current assets exceeding average current liabilities by $29.8 million for the 11-year period. During the same period the average monthly average working capital requirement was $11.1 million. In 1977, Soo Line reported its strongest working capital position since 1968, with a working capital ratio of 2.06 and working capital of $48.5 million. Working capital for 1978 is lower than the previous year primarily because of a change in the Uniform System of Accounts.

Rate of return.—Soo Line's investment in transportation property has increased consistently, from $310.8 million in 1968 to $432.7 million in 1978. During this same period, the return on net investment has increased from 3.73 percent to 7.63 percent. This compares with a western district average of 3.36 percent for the same period and a 1978 return of 4.40 percent.

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Long-term debt.—The carrier's long-term debt due within 1 year has gradually increased, from $4 million in 1968 to $8.8 million in 1978. Though this is a significant percentage increase, the dollar amount is insignificant in relation to the carrier's ability to service this debt. The carrier has consistently earned ample net income to cover maturing debt.

Long-term debt due after 1 year has gradually increased, but the carrier's earnings potential seems more than adequate to meet the maturing obligations.

Debt-equity ratio.—The carrier's debt-to-equity position has been strong ranging from a low of 35.1 percent in 1971 to a high of 39.6 percent in 1974. The 47.9 percent ratio for 1978 is not comparable to the prior years.

Fixed charges.—Soo Line had no problem in meeting its fixed charges payments during the period studied. The average income available during 1968-78 was $19.1 million, while the average fixed charges were only $4.1 million. This indicates that annual income available for fixed charges was 4.7 times greater than the fixed charges, a very good coverage.

Net rents.—Net rents have gradually increased during the 8-year period, 1971-78, to a $15.1 million debit in 1977. Soo Line's total car fleet decreased by 14.7 percent while the carrier's aggregate capacity for the units increased by 4.1 percent for the same period.

Estimated losses due to diversion.—The applicants estimate that Soo Line would lose about $243,200 in gross freight revenues as a result of the proposed transaction, which represents 0.13 percent of 1976 gross freight revenues. Soo Line estimates that it will lose about $1,281,280 in gross freight revenues, which represents 0.68 percent of 1976 gross freight revenues. Soo Line submitted evidence which indicated that its annual net diversion loss would be $813,000.

Even if Soo Line's estimate of diversions is accurate and the carrier does lose $1.3 million in gross freight revenues we do not expect losses of that magnitude to have a significant adverse affect on the carrier. However, we estimated that Soo Line will lose gross freight revenues of about $0.49 million and net revenues of about $0.24 million.

Soo Line—income items, dividends, 1968-78

	1978[1]	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total railway operating revenues	$251,279	$217,251	$189,289	$161,155	$179,792	$168,324	$140,651	$124,478	$113,089	$105,739	$94,075
Total railway operating expenses	213,199	149,870	130,758	114,734	124,947	114,999	102,409	92,256	83,417	79,908	70,915
Net railway operating income	25,835	21,288	18,262	12,921	14,884	19,883	13,809	10,759	8,834	7,790	8,836
Income available for fixed charges	43,942	26,353	22,630	16,620	20,200	22,797	14,973	12,313	10,734	9,442	10,319
Fixed charges	7,240	6,304	5,160	4,910	4,582	3,829	3,332	3,243	2,498	2,353	2,216
Total extraordinary items and accounting charges	-0-	-0-	-0-	-0-	-0-	-0-	-0-	-0-	(534)	-0-	-0-
Net income	23,323	18,802	16,201	10,413	14,307	17,620	10,264	7,678	6,006	5,379	6,375
Dividends appropriated	11,647	9,748	7,595	5,950	11,393	6,026	4,114	3,950	3,481	2,543	4,431
Provision for deferred taxes	4,000	2,955	2,600	2,200	3,000	--------	-------	--------	--------	--------	-------
Undistributed earnings	291	144	203	261	268	--------	-------	--------	--------	--------	-------
Restated net income[2]	27,032	21,613	18,598	12,352	17,039	--------	-------	--------	--------	--------	-------

[1]As of January 1, 1978, the Uniform System of Accounts was revised. Railway operating expenses for 1978 is not comparable to prior years.
[2]Net income was restated for comparative purposes by excluding provision for deferred taxes and undistributed earnings from affiliated companies.

Soo Line—working capital, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Total current assets	$110,859	$94,062	$81,196	$66,025	$66,669	$65,353	$53,735	$44,923	$45,663	$35,884	$35,873
Total current liabilities	67,097	45,603	40,907	32,786	34,766	35,269	28,678	24,541	26,853	18,337	17,970
Working capital	43,762	48,459	40,289	33,239	31,903	30,084	25,057	20,382	18,810	17,547	17,903
Total operating expenses	213,199	149,870	130,758	114,734	124,947	114,999	102,409	92,256	83,417	79,908	70,915
Property depreciation	1,218	1,150	1,236	1,360	1,367	1,420	1,390	1,365	1,353	1,326	1,276
Equipment depreciation	6,798	6,463	4,994	4,600	4,516	4,342	4,088	3,880	3,764	3,655	3,578
Net rents	(2)	(15,094)	(14,136)	(10,960)	(12,909)	(13,764)	(10,295)	(9,732)	(8,426)	(9,081)	(5,799)
Payroll and other railway taxes excluding income taxes	(3)	21,946	19,954	16,875	17,887	14,177	11,542	10,281	9,511	8,704	11,356
Operating expenses less depreciation plus net rents and taxes	205,183	179,297	158,618	136,609	149,860	137,178	118,768	107,024	96,237	92,712	83,216
Monthly average working capital requirement	17,099	14,941	13,218	11,384	12,488	11,431	9,897	8,919	8,020	7,726	6,935
Working capital ratio	1.65	2.06	1.98	2.01	1.92	1.85	1.87	1.83	1.70	1.96	2.00

[1]Equipment obligations and other long-term debt due within 1 year are included in total current liabilities for 1978. Prior to 1978 they were not included.
[2]Net rents are included in operating expenses for 1978.
[3]Taxes are included in operating expenses for 1978.

Soo Line—rate of return on net investment in transportation property, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Investment in transportation property	$432,713	$410,290	$393,018	$371,056	$365,410	$352,539	$331,672	$324,052	$318,347	$314,825	$310,797
Cash	459	2,232	638	(233)	834	(271)	112	440	941	592	396
Material and supplies	19,041	16,675	14,035	17,557	16,198	12,342	10,143	7,628	9,099	7,758	6,841
Depreciation and amortization	113,761	109,541	105,363	99,965	96,857	92,754	89,740	87,546	85,107	82,810	81,208
Net investment	338,452	319,656	302,328	288,415	285,585	271,856	252,187	244,574	243,280	240,365	236,826
Net railway operating income	25,835	21,288	18,262	12,921	14,884	19,883	13,809	10,759	8,834	7,790	8,836
Net railway operating income as a percent of net investment	7.63	6.66	6.04	4.48	5.21	7.31	5.48	4.40	3.63	3.24	3.73

Soo Line—debt structure, 1968-78

	1978	1977	1976	1975	1974	1973	1972	1971	1970	1969	1968
					Thousands						
Long-term debt due within 1 year	$8,775	$8,068	$6,704	$5,780	$5,328	$4,885	$4,546	$4,008	$3,769	$3,491	$4,006
Long-term debt due after 1 year	[1]64,955	109,314	103,537	97,318	95,774	93,717	89,887	81,486	80,561	81,010	80,556
Total stockholders' equity	179,730	168,054	159,000	150,394	145,931	168,687	157,093	150,943	147,214	144,690	141,893
Debt-equity ratio----percent	47.9	39.4	39.4	39.3	39.6	35.7	36.4	35.1	35.4	35.9	36.2

[1]Long-term debt due after 1 year for 1978 is not comparable to prior years.

Southern Pacific-Cotton Belt.—Both SP and Cotton Belt are financially strong and profitable. SP earns a substantial amount of revenue from nonoperating sources. During 1978, operating expenses rose due to an expanded maintenance program and increased transportation expenses. These carriers were adversely affected during 1978 by inclement weather and the coal strike. We are not concerned about the financial condition of either carriers.

The applicants have estimated that SP will lose approximately $2.0 million in gross revenue and Cotton Belt will lose $1.4 million in gross revenues due to diversions. The carriers should not be harmed by the estimated diversions, which represent less than 1 percent of total railway operating revenues for 1976.

Union Pacific.—UP is profitable and financially strong. The applicants have estimated that UP will lose approximately $5.9 million in gross revenues. The estimated lost revenue is equivalent to about 0.5 percent of the carrier's 1976 total railway operating revenues. The carrier should not be affected adversely by the estimated amount of revenue diversions.

Atchison, Topeka and Santa Fe.—Santa Fe is an efficient, well maintained and profitable carrier. The applicants have estimated that Santa Fe will lose approximately $6.7 million in gross revenues, or approximately 0.5 percent of its total 1976 operating revenues. The carrier should not be substantially harmed by the loss of the anticipated revenues.

Denver and Rio Grande Western.—D&RGW reported total operating revenues of over $200 million for 1978. Major contributions were made by coal traffic (which increased from the prior year and accounted for approximately 30 percent of the total operating revenues), an improved traffic mix, and freight rate increases. D&RGW is a financially strong and profitable carrier. The applicants have estimated that D&RGW will receive additional freight revenues of approximately $1.4 million as a result of the merger.

Missouri Pacific.—Mopac serves a fast growing area and has experienced much industrial expansion along its system. Its future prospects are excellent. This carrier is financially strong and well maintained. The applicants estimate that Mopac will lose approximately $7.7 million, or less than 1 percent of total operating revenues for 1976 due to diversions. The carrier should not be substantially harmed as a result.

Southern Railway.—Southern is an aggressive railroad serving the Southeast. During 1978, the strike against N&W affected Southern, yet it was able to report a net income of $131.2 million, up from $110.5 million for 1977. This carrier is well maintained and financially strong. The applicants have estimated that Southern will suffer a gross revenue loss of approximately $7.9 million due to diversions. The estimated diversions represent 1.2 percent of Southern's gross revenues for 1976. It is not anticipated that this loss will substantially harm Southern.

Family Lines.—SCL is a strong and profitable railroad serving the growing Southeast. It controls L&N, which derives a substantial portion of its revenue from coal traffic. In the past, L&N has been profitable; however, 1978 was a bad year for this carrier, which reported a net loss of $30.1 million. L&N was hurt by strikes of United Mine Workers, Brotherhood of Railway and Airline Clerks, and an unusual and infrequent debit of over $9 million. L&N is expected to recover from the net loss suffered in 1978 and not to experience financial difficulties in the near future.

The applicants have estimated that L&N will lose approximately $6.5 million in gross revenues or less than 1 percent of total operating revenues for 1976, while SCL will gain approximately $1.3 million as a result of the merger. A revenue loss in the magnitude estimated should not substantially harm L&N.

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Illinois Terminal Railroad.—ITC is a bridge carrier jointly controlled by nine stockholders, including eight railroads and Penn Central Transportation Company. This carrier operates in southern and central Illinois and into St. Louis. ITC has been profitable with the exception of a reported $3 million net loss for 1978 due principally to increased expenses. Its stockholders have a vital interest in maintaining this carrier since they connect with it.

The applicants have estimated that ITC will lose approximately $80,700 to diversions, which represents less than 0.5 percent of railway operating revenues for 1976. Such a loss would not greatly harm this carrier.

Kansas City Southern.—KCS has been profitable and is undergoing an upgrading and improvement to its facilities. It has benefited from higher freight rates, increased number of carloads handled, and especially in the surge in coal traffic. The applicants have estimated that KCS would lose approximately $2.0 million as a result of diversions caused by the merger, or slightly more than 1 percent of total railway revenues for 1976. KCS should not be substantially harmed as a result of such a loss.

Southern Pacific

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$1,653,884	$1,560,444	$1,471,555
Total railway operating expenses	1,616,275	1,207,760	1,114,848
Net railway operating income	36,001	53,725	49,947
Income available for fixed charges	110,554	133,636	130,374
Fixed charges	59,613	54,050	49,111
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	49,369	79,586	81,263
Dividends appropriated	48,961	64,054	45,597
Provision for deferred taxes	(1,635)	21,791	(2,579)
Undistributed earnings	(5,590)	(2,689)	24,053
Restated net income	53,324	104,066	54,631
Working capital			
Total current assets	474,007	442,251	434,729
Total current liabilities	487,445	330,738	304,306
Working capital	(13,438)	137,945	103,991
Total operating expenses	1,616,275	1,207,760	1,114,848
Property depreciation	17,089	13,658	13,271
Equipment depreciation	67,245	57,516	62,846
Net rents	----------	(124,735)	(113,378)
Payroll and other railway taxes excluding income taxes	----------	152,533	140,007
Operating expenses less depreciation plus net rents and taxes	1,531,941	1,413,854	1,292,116
Monthly average working capital requirement	127,662	117,821	107,676
Working capital ratio----------percent	0.97	1.34	1.43

Southern Pacific—Continued

	1978	1977	1976
		Thousands	
Rate of return			
Investment in transportation property	$3,036,429	$2,859,730	$2,800,257
Cash	6,548	10,393	10,299
Material and supplies	55,385	41,214	37,748
Depreciation and amortization	797,693	769,283	659,615
Net investment	2,300,669	2,142,053	2,188,689
Net railway operating income as a percentage of net investment	1.56	2.51	2.28
Debt structure			
Long-term debt due within 1 year	67,625	61,831	91,940
Long-term debt due after 1 year	1,340,200	777,053	795,217
Total stockholders' equity	1,555,069	1,558,383	1,542,851
Debt-equity ratio—percent	46.3	33.3	34.0

St. Louis Southwestern Railway

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$226,338	$216,250	$192,296
Total railway operating expenses	189,018	170,008	149,626
Net railway operating income	32,719	32,954	42,234
Income available for fixed charges	47,405	40,353	47,586
Fixed charges	9,905	9,573	8,494
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	32,898	30,780	38,982
Dividends appropriated	35,356	31,061	18,175
Provision for deferred taxes	2,492	14,439	(48)
Undistributed earnings	32	(21)	518
Restated net income	35,358	45,240	38,416
Working capital			
Total current assets	145,587	124,612	97,117
Total current liabilities	78,080	52,322	40,849
Working capital	67,507	72,290	56,268
Total operating expenses	189,018	170,008	149,626
Property depreciation	1,298	1,221	1,205
Equipment depreciation	20,885	19,775	18,689

St. Louis Southwestern Railway—Continued

	1978	1977	1976
		Thousands	
Working capital—Continued			
Net rents	----------	$(20,624)	$(19,85)
Payroll and other railway taxes excluding income taxes	----------	17,764	16,337
Operating expenses less depreciation plus net rents and taxes	$166,835	187,400	165,920
Monthly average working capital requirement	13,903	15,617	13,827
Working capital ratio----------percent	1.86	2.38	2.38
Rate of return			
Investment in transportation property	572,327	562,165	539,524
Cash	6,914	2,330	1,136
Material and supplies	5,064	5,614	5,412
Depreciation and amortization	160,790	146,206	131,703
Net investment	423,515	423,903	414,369
Net railway operating income as a percentage of net investment	7.73	7.77	10.19
Debt structure			
Long-term debt due within 1 year	9,311	8,067	7,141
Long-term debt due after 1 year	253,786	116,956	113,980
Total stockholders' equity	290,832	293,290	293,290
Debt-equity ratio----------percent	46.6	28.5	28.0

Union Pacific

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$1,491,315	$1,299,216	$1,161,170
Total railway operating expenses	1,238,947	970,337	875,483
Net railway operating income	179,842	149,754	135,790
Income available for fixed charges	258,492	161,995	141,395
Fixed charges	44,222	45,733	42,739
Total extraordinary items and accounting charges	-0-	-0-	7,500
Net income	141,801	116,262	106,156
Dividends appropriated	67,366	65,795	65,795
Provision for deferred taxes	16,315	39,697	15,739
Undistributed earnings	4,342	2,199	2,051
Restated net income	153,774	153,760	119,844

Union Pacific—Continued

	1978	1977	1976
		Thousands	
Working capital			
Total current assets	$315,695	$254,030	$208,451
Total current liabilities	338,381	303,879	282,818
Working capital	(22,686)	(49,849)	(74,367)
Total operating expenses	1,238,947	970,337	875,483
Property depreciation	9,946	9,101	9,587
Equipment depreciation	76,495	73,790	68,452
Net rents	----------	(6,357)	(9,779)
Payroll and other railway taxes excluding income taxes	----------	111,703	100,478
Operating expenses less depreciation plus net rents and taxes	1,152,506	992,792	888,143
Monthly average working capital requirement	96,042	82,733	74,012
Working capital ratio----------percent	0.93	0.84	0.74
Rate of return			
Investment in transportation property	3,151,692	2,996,950	2,861,974
Cash	7,637	14,123	8,949
Material and supplies	69,249	58,741	53,988
Depreciation and amortization	684,269	663,500	630,665
Net investment	2,544,309	2,406,314	2,294,246
Net railway operating income as a percentage of net investment	7.07	6.22	5.92
Debt structure			
Long-term debt due within 1 year	46,553	49,973	44,729
Long-term debt due after 1 year	1,139,568	576,435	485,749
Total stockholders' equity	1,421,977	1,347,542	1,297,075
Debt-equity ratio----------percent	44.5	30.0	27.3

Atchison, Topeka and Santa Fe

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$1,530,839	$1,349,005	$1,149,248
Total railway operating expenses	1,338,054	1,105,606	942,752
Net railway operating income	110,929	80,775	66,153

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Atchison, Topeka and Santa Fe—Continued

	1978	1977	1976
		Thousands	
Income items—Continued			
Income available for fixed charges	$160,764	$108,640	$86,100
Fixed charges	35,173	32,079	29,716
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	92,539	75,289	55,096
Dividends appropriated	36,000	36,000	36,000
Provision for deferred taxes	28,211	12,378	(1,889)
Undistributed earnings	22	(1,756)	593
Restated net income	120,728	89,423	52,614
Working capital			
Total current assets	416,086	350,742	307,480
Total current liabilities	314,911	231,120	198,664
Working capital	101,175	119,622	108,836
Total operating expenses	1,388,054	1,105,560	942,752
Property depreciation	10,414	9,792	11,797
Equipment depreciation	66,122	60,716	51,220
Net rents	.....	(34,838)	(34,291)
Payroll and other railway taxes excluding income taxes	.....	116,365	101,131
Operating expenses less depreciation plus net rents and taxes	1,311,518	1,186,255	1,015,157
Monthly average working capital requirement	109,293	98,855	84,596
Working capital ratio—percent	1.32	1.52	1.55
Rate of return			
Investment in transportation property	2,963,227	2,818,474	2,641,016
Cash	10,517	8,565	5,177
Material and supplies	79,418	78,368	73,052
Depreciation and amortization	852,461	816,967	769,674
Net investment	2,200,701	2,088,440	1,949,571
Net railway operating income as a percentage of net investment	5.04	3.87	3.39
Debt structure			
Long-term debt due within 1 year	39,087	39,122	28,440
Long-term debt due after 1 year	882,602	492,955	440,161
Total stockholders' equity	1,434,520	1,378,135	1,316,014
Debt-equity ratio—percent	38.1	26.3	25.1

Denver and Rio Grande Western

	1978	1977	1976
		Thousands	
Income items			
Total railway operting revenues	$218,016	$179,747	$168,503
Total railway operating expenses	179,755	135,841	125,762
Net railway operating income	25,480	21,170	17,576
Income available for fixed charges	42,206	24,432	21,363
Fixed charges	4,414	4,335	4,078
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	24,501	19,493	16,603
Dividends appropriated	9,232	8,669	8,346
Provision for deferred taxes	1,561	1,922	2,725
Undistributed earnings	578	432	395
Restated net income	25,484	20,983	18,933
Working capital			
Total current assets	76,925	59,885	54,514
Total current liabilities	56,603	37,042	35,840
Working capital	20,322	22,843	18,674
Total operating expenses	179,755	135,841	125,762
Property depreciation	2,211	2,066	1,946
Equipment depreciation	8,926	8,353	7,901
Net rents	.....	62	(1,763)
Payroll and other railway taxes excluding income taxes	.....	16,343	15,541
Operating expenses less depreciation plus net rents and taxes	166,618	141,703	133,219
Monthly average working capital requirement	14,051	11,809	11,102
Working capital ratio-----percent	1.36	1.62	1.52
Rate of return			
Investment in transportation property	430,591	407,697	391,811
Cash	3,707	2,692	6,198
Material and supplies	12,117	13,625	10,843
Depreciation and amortization	119,265	111,129	103,720
Net investment	327,150	412,885	305,132
Net railway operating income as a percentage of net investment	7.79	5.13	5.76
Debt structure			
Long-term debt due within 1 year	6,336	5,687	5,659
Long-term debt due after 1 year	132,269	77,565	67,178
Total stockholders' equity	220,598	205,247	194,423
Debt-equity ratio-----percent	37.5	27.4	25.7

Missouri Pacific

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$1,198,064	$1,064,028	$902,488
Total railway operating expenses	1,019,494	760,852	659,618
Net railway operating income	135,676	134,776	76,456
Income available for fixed charges	202,969	158,241	118,547
Fixed charges	49,677	39,546	32,450
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	101,139	108,882	76,314
Dividends appropriated	28,065	21,412	15,440
Provision for deferred taxes	13,790	10,628	9,553
Undistributed earnings	2,534	(448)	14,015
Restated net income	112,395	119,958	71,852
Working capital			
Total current assets	399,992	332,313	304,536
Total current liabilities	309,705	208,382	213,324
Working capital	90,287	123,931	91,212
Total operating expenses	1,019,494	760,852	659,618
Property depreciation	9,136	8,559	7,959
Equipment depreciation	44,152	34,202	28,343
Net rents	----------	(80,687)	(76,533)
Payroll and other railway taxes excluding income taxes	----------	81,127	59,863
Operating expenses less depreciation plus net rents and taxes	966,206	879,905	759,712
Monthly average working capital requirement	80,517	73,325	63,309
Working capital ratio----------percent	1.29	1.59	1.43
Rate of return			
Investment in transportation property	2,154,546	1,864,358	1,736,904
Cash	17,440	17,170	9,025
Material and supplies	52,129	44,171	50,548
Depreciation and amortization	520,740	457,360	439,903
Net investment	1,703,375	1,468,339	1,356,574
Net railway operating income as a percentage of net investment	7.97	9.18	5.64
Debt structure			
Long-term debt due within 1 year	53,544	40,881	42,548
Long-term debt due after 1 year	1,162,336	802,831	819,609
Total stockholders' equity	687,884	619,916	680,729
Debt-equity ratio----------percent	62.8	58.4	54.6

Southern Railway

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$809,653	$732,902	$654,581
Total railway operating expenses	702,949	551,986	488,912
Net railway operating income	93,608	88,101	72,566
Income available for fixed charges	186,519	148,704	124,007
Fixed charges	40,557	38,158	31,458
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	131,194	110,546	92,549
Dividends appropriated	47,741	44,094	39,822
Provision for deferred taxes	17,622	14,383	12,538
Undistributed earnings	34,673	27,782	18,715
Restated net income	114,143	97,147	86,372
Working capital			
Total current assets	434,069	391,849	384,254
Total current liabilities	316,845	241,574	229,358
Working capital	117,224	150,275	154,896
Total operating expenses	702,949	551,986	488,912
Property depreciation	6,897	8,203	7,916
Equipment depreciation	40,468	32,134	30,401
Net rents	----------	(15,002)	(13,757)
Payroll and other railway taxes excluding income taxes	----------	60,000	54,021
Operating expenses less depreciation plus net rents and taxes	655,584	586,651	518,373
Monthly average working capital requirment	54,632	48,888	43,198
Working capital ratio----------percent	1.37	1.62	1.67
Rate of return			
Investment in transportation property	1,803,476	1,691,306	1,530,391
Cash	5,296	3,019	8,220
Material and supplies	53,709	55,143	38,052
Depreciation and amortization	501,540	433,807	408,216
Net investment	1,360,941	1,243,661	1,168,447
Net railway operating income as a percentage of net investment	6.88	7.08	6.21
Debt structure			
Long-term debt due within 1 year	43,385	36,653	48,026
Long-term debt due after 1 year	776,584	484,610	471,645
Total stockholders' equity	1,180,574	1,092,780	1,022,824
Debt-equity ratio----------percent	39.7	30.7	31.6

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Seaboard Coast Line Railroad

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$910,509	$826,910	$728,485
Total railway operating expenses	813,164	618,635	549,107
Net railway operating income	105,478	80,591	56,397
Income available for fixed charges	106,313	137,677	117,743
Fixed charges	40,048	34,640	32,370
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	69,354	103,037	85,373
Dividends appropriated	32,891	30,536	24,373
Provision for deferred taxes	(1,898)	(941)	1,053
Undistributed earnings	(5,986)	27,730	29,126
Restated net income	73,442	74,336	57,300
Working capital			
Total current assets	301,141	247,453	216,768
Total current liabilities	245,085	182,046	159,228
Working capital	56,056	65,407	57,540
Total operating expenses	813,164	618,635	549,107
Property depreciation	7,310	6,872	6,345
Equipment depreciation	30,383	30,096	27,466
Net rents	----------	(62,650)	(53,665)
Payroll and other railway taxes excluding income taxes	----------	70,853	62,175
Operating expenses less depreciation plus net rents and taxes	775,471	715,170	631,136
Monthly average working capital requirement	64,623	59,597	52,595
Working capital ratio----------percent	1.23	1.36	1.36
Rate of return			
Investment in transportation property	1,716,227	1,685,875	1,610,382
Cash	(7,911)	(2,384)	1,271
Material and supplies	51,310	43,468	40,954
Depreciation and amortization	441,995	430,469	412,431
Net investment	1,317,631	1,296,490	1,240,176
Net railway operating income as a percentage of net investment	8.01	6.22	4.55
Debt structure			
Long-term debt due within 1 year	39,644	38,923	37,255
Long-term debt due after 1 year	710,133	506,529	348,637
Total stockholders' equity	1,229,682	1,193,219	1,125,939
Debt-equity ratio----------percent	36.6	29.8	28.5

Louisville and Nashville Railroad

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$824,429	$764,217	$682,790
Total railway operating expenses	803,728	597,049	524,219
Net railway operating income	23,847	54,873	58,553
Income available for fixed charges	27,793	70,923	71,058
Fixed charges	49,128	50,073	43,291
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	(31,198)	20,272	27,146
Dividends appropriated	-0-	14,942	13,350
Provision for deferred taxes	1,044	(663)	(295)
Undistributed earnings	699	1,012	(273)
Restated net income	(30,853)	18,597	27,724
Working capital			
Total current assets	226,069	170,083	163,157
Total current liabilities	250,663	149,064	127,437
Working capital	(24,594)	21,009	35,720
Total operating expenses	803,728	597,049	525,219
Property depreciation	6,110	6,105	5,708
Equipment depreciation	39,888	39,007	33,104
Net rents	----------	(50,380)	(46,960)
Payroll and other railway taxes excluding income taxes	----------	63,823	56,131
Operating expenses less depreciation plus net rents and taxes	757,730	666,140	588,498
Monthly average working capital requirement	63,144	55,512	49,041
Working capital ratio----------percent	0.90	1.14	1.28
Rate of return			
Investment in transportation property	1,711,243	1,713,520	1,602,665
Cash	5,983	2,123	5,056
Material and supplies	29,724	25,562	26,216
Depreciation and amortization	495,356	476,029	438,492
Net investment	1,251,594	1,265,176	1,195,445
Net railway operating income as a percentage of net investment	1.91	4.34	4.90
Debt structure			
Long-term debt due within 1 year	48,864	47,975	39,762
Long-term debt due after 1 year	770,214	593,068	535,146
Total stockholders' equity	506,811	538,009	529,123
Debt-equity ratio----------percent	60.3	52.4	50.3

Illinois Terminal Railroad

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$24,805	$23,496	$22,430
Total railway operating expenses	27,025	19,051	17,797
Net railway operating income	(2,311)	1,144	1,408
Income available for fixed charges	(2,062)	1,351	1,805
Fixed charges	1,186	1,089	1,178
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	(3,339)	262	627
Dividends appropriated	-0-	-0-	-0-
Provision for deferred taxes	-0-	269	438
Undistributed earnings	-0-	-0-	-0-
Restated net income	(3,339)	531	1,065
Working capital			
Total current assets	8,616	7,238	7,634
Total current liabilities	14,859	8,585	7,865
Working capital	(6,243)	(1,347)	(231)
Total operating expenses	27,025	19,051	17,797
Property depreciation	83	83	78
Equipment depreciation	897	856	902
Net rents	.....	(1,146)	(478)
Payroll and other railway taxes excluding income taxes	.....	1,877	2,309
Operating expenses less depreciation plus net rents and taxes	26,045	18,843	18,648
Monthly average working capital requirement	2,170	1,570	15,550
Working capital ratio----------percent	0.58	0.84	0.97
Rate of return			
Investment in transportation property	40,894	40,431	38,720
Cash	101	113	112
Material and supplies	2,045	1,931	2,194
Depreciation and amortization	12,517	11,607	10,723
Net investment	30,523	30,868	30,303
Net railway operating income as a percentage of net investment	-0-	3.71	4.65
Debt structure			
Long-term debt due within 1 year	1,687	1,783	1,629
Long-term debt due after 1 year	16,308	14,807	15,321
Total stockholders' equity	9,909	13,248	12,986
Debt-equity ratio----------percent	62.2	52.8	54.1

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Kansas City Southern Railway

	1978	1977	1976
		Thousands	
Income items			
Total railway operating revenues	$192,150	$163,375	$147,393
Total railway operating expenses	170,291	124,341	113,059
Net railway operating income	18,096	11,342	6,681
Income available for fixed charges	26,648	14,491	6,942
Fixed charges	7,165	6,093	4,509
Total extraordinary items and accounting charges	-0-	-0-	-0-
Net income	14,382	8,396	2,433
Dividends appropriated	4,768	689	291
Provision for deferred taxes	4,494	4,375	790
Undistributed earnings	135	153	(159)
Restated net income	18,741	12,618	3,382
Working capital			
Total current assets	46,522	34,598	25,415
Total current liabilities	49,726	30,545	23,190
Working capital	----------	4,053	2,225
Total operating expenses	170,291	124,341	113,059
Property depreciation	2,133	1,848	976
Equipment depreciation	10,211	9,154	5,672
Net rents	----------	(11,162)	(14,449)
Payroll and other railway taxes excluding income taxes	----------	12,815	11,715
Operating expenses less depreciation plus net rents and taxes	157,947	137,316	132,575
Monthly average working capital requirement	13,162	11,443	11,048
Working capital ratio—percent	0.94	1.13	1.10
Rate of return			
Investment in transportation property	359,794	321,503	254,347
Cash	(3,460)	(2,215)	(3,505)
Material and supplies	13,743	14,149	11,884
Depreciation and amortization	99,805	91,195	56,938
Net investment	270,272	242,242	205,788
Net railway operating income as a percentage of net investment	6.70	4.68	3.25
Debt structure			
Long-term debt due within 1 year	10,281	10,263	7,275
Long-term debt due after 1 year	155,475	92,906	65,824
Total stockholders' equity	133,669	124,055	118,204
Debt-equity ratio—percent	55.8	42.8	35.8

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APPENDIX K

Protective conditions sought

I. BY CARRIERS THROUGH STIPULATION

A. The following general traffic protective conditions were agreed to by applicants with Family Lines, ITC, KCS, Mopac, Santa Fe, Southern, SP-Cotton Belt, UP, and CNW:

1. Upon consolidation of the applicants' properties, franchises, and operating authorities, the new consolidated company shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Interstate Commerce Commission.

2. The present neutrality of handling traffic inbound and outbound and in overhead service by applicants shall be continued by the new consolidated company so as to permit equal opportunity for service to and from all lines reaching the rails of the new consolidated company without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between applicants, on the one hand, and all lines connecting with their tracks, on the other, shall be continued.[1]

4. The new consolidated company shall accept, handle and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

5. The new consolidated company shall not do anything to restrain or curtail the right of industries now or hereafter located on BN and Frisco and their subsidiaries to route traffic over any and all existing gateways.

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[1]The agreement with Southern is somewhat different on this point. It provides:

> The present traffic and operating relationships existing between BN and Southern, and between Frisco and Southern, and all other lines connecting with BN and Frisco, shall be continued by the new consolidated company. Such relationships include by way of example, not by way of limitation, cooperation in providing and maintaining present levels of run-through train service at Centralia, IL, pursuant to agreement between BN and Southern dated July 6, 1970, as amended, so long as warranted by traffic volume, and provided that Southern also maintains present levels of train service to and from Centralia. Such relationships also include trackage rights and other operating arrangements between BN and Southern and between Frisco and Southern. Southern consents to the new consolidated company succeeding Frisco as tenant under any such arrangements. Upon merger of BN and Frisco, the new consolidated company will acquire all rights and obligations now held by Frisco under any such arrangements or agreements.

The agreement with UP on this point includes the following additional provisions:

> Following consummation of the merger of Frisco into BN, the new consolidated company and UP will continue to provide existing run-through train service via Kansas City, MO, now provided jointly by Frisco and UP, at at least the current level of service, as long as the volume of traffic moving in such run-through trains warrants their operation.
>
> In this regard, the new consolidated company and UP will use their best effort and cooperate with each other in order to maintain and improve the quality of their run-through train service on Kansas City, MO.

6. The new consolidated company shall refrain from closing any existing route or channel of trade with any carrier, unless and until so authorized by the Commission.

7. The consolidated company shall preserve the opportunity for *** participation in through routes and rates on future traffic (including new movements as well as present movements) to the same extent as *** would have been able to participate prior to the merger.[1]

8. If the new consolidated company establishes through routes and rates which extend its route beyond junctions where *** has been a connecting carrier, the new consolidated company will continue to join *** in routes via the former junctions, and will negotiate in good faith divisions of revenues via such routes.[2]

9. Applicants, to the extent that they may legally do so, will require any other railroad which may be included in the merger to agree to the foregoing conditions.

10. Any party or person having an interest in the subject matter may at any future time petition for such modification in the above conditions as may be deemed in the public interest, and jurisdiction shall be retained to reopen the proceedings on the motion of the Commission for the same purpose.

B. Additional specific conditions agreed to are listed below.

KCS

The new consolidated company shall afford KCS the opportunity to quote on routing via KCS as an alternate to the other junctions on unit-train, trainload and multiple-car movements of coal from BN origins in Montana and Wyoming to points presently served by KCS or which may in the future be served by KCS.

Santa Fe

Applicants will not oppose Santa Fe's acquisition from the Pennsylvania Company of the latter's stock interest in the Toledo, Peoria, and Western Railroad Company (TP&W) as said transaction is described in a certain letter dated July 24, 1979, from Mr. John S. Reed to Mr. Norman M. Lorentzsen.

CNW

1. Following merger of BN and Frisco, the merged company shall grant trackage rights to CNW between St. Paul, MN, and Superior, WI, over approximately 140.3 miles of BN trackage. The trackage extends in a generally northerly direction from Claymont to Superior (Saunders) via Hinckly and is more particularly described in the verified statement of Mr. C. E. Able appearing in the record as exhibit H-201. These trackage rights shall be bridge rights only and CNW will have no right to serve BN

[1]Where asterisks appear in conditions 7 and 8, insert the applicable stipulating carriers(s): the Family Lines System; the Illinois Terminal Railroad Company; Kansas City Southern; Atchison, Topeka and Santa Fe Railway Company and its subsidiaries; Southern; SP, Cotton Belt, and their subsidiaries; UP and its subsidiaries; or CNW.

[2]With respect to Family Lines, such junctions will include (but not be restricted to) Birmingham, Woodlawn, Chicago, St. Louis, and Memphis.

With respect to Mopac, such junctions will include (but not be restricted to) Kansas City, St. Louis and East St. Louis, Memphis, Fort Worth, and Omaha.

With respect to Southern, such junctions will include (but not be restricted to) Centralia and East St. Louis, IL; Memphis, TN; and Birmingham, AL.

With respect to SP-Cotton Belt, such junctions will include (but not be restricted to) St. Louis, MO; East St. Louis, IL; Memphis, TN; and Fort Worth, Dallas, and Sherman, TX.

With respect to KCS, such junctions will include (but not be restricted to) Kansas City, Dallas, Neosho, Ashdown, and Hope.

local industries situated on the described trackage. A precise description of the trackage over which rights will be granted and the terms and conditions governing the grant of said trackage rights will be fully set forth in a separate agreement which shall be filed with the Commission for approval when completed and executed. BN and CNW will fully support the grant of said trackage rights within the scope of the terms of the aforementioned agreement. Said agreement shall include in substance the following terms:

a. CNW will pay one-half of 10 percent of the agreed joint facility valuation monthly, divided by the number of railroads using the trackage.

b. The initial joint facility valuation of the subject trackage including land value is agreed by the parties to be $12,482,220.

c. Maintenance and operation expense will be paid by CNW on a car-mile proportion of costs incurred by BN for maintenance, operations, taxes and assessments.

2. Following merger of BN and Frisco, the merged company shall grant to CNW an option, exercisable during a 2-year period commencing on the date the merger is consummated, to enter into a 50-year lease pursuant to which CNW would lease from BN approximately 20 acres of land located within its Union Yard complex and which land is more particularly identified on the print attached to the stipulation. CNW shall purchase from BN for $346,821 the track material, consisting mainly of trackage, turnouts and ties, which occupy said land and shall pay the cost of BN trackage rearrangements necessary to effectuate the lease and permit continued BN service and operations including, but not limited to, service to Union Elevator. All future track material installed by CNW shall remain the property of CNW. Under the lease CNW shall pay to BN, in equal monthly installments, an annual rental equal to 10 percent of the value of the land subject to the lease. The initial value of the land to be leased CNW is agreed by the parties to be $1.25 per square foot on the effective date of the merger. The value of the land at lease commencement date shall be $1.25 per square foot increased by reference to the performance of the Consumer Price Index during the period between consummation of the merger and the lease commencement date. The land value shall be further escalated during the life of the lease at 5-year intervals by reference to the Consumer Price Index. The parties will incorporate the foregoing substantive terms in an option and lease agreement, satisfactory in form to the parties, which fully describes the property and governing terms and conditions, and which will be filed with the Commission for approval when completed and executed.

SP-Cotton Belt

1. Following merger of BN and Frisco, the merged company shall grant trackage rights to SP in the Portland, OR, area to provide SPT access to the North and South Rivergate industrial areas over BN owned trackage. SPT shall have 5 years after the approval by the Commission of an appropriate trackage rights agreement to exercise such authority. The southernly termini of the trackage rights will be the junction of BN's east and westbound main lines with the trackage of the Portland Terminal Railroad between Guilds Lake Yard and Portland Union Station. The northerly terminal will be the connection between BN and UP trackage near Barnes Yard in the vicinity of East St. John's and also the beginning of North Rivergate trackage at North Portland in the approximate vicinity of BN milepost 8.154. These trackage rights shall be bridge rights only and SPT will have no right to serve BN local industries situated between the end points described above except within the North and South Rivergate industrial areas. The precise description of the trackage over which rights will be

granted and the terms and conditions governing the grant of said trackage rights will be fully set forth in a separate agreement which shall be filed with the Commission for approval when completed and executed. BN and SP will fully support the grant of said trackage rights within the scope of the terms of the aforementioned agreement. Said agreement shall include in substance the following terms:

a. If BN handles SP cars, SP will pay monthly a sum equal to one-twelfth of 8 percent of joint facility valuation of the trackage in question divided by the number of railroads using the trackage. For purposes of this agreement, BN and BN subsidiaries are considered as one railroad.

b. If SP handles its own cars to and from North and South Rivergate with its own locomotives and crews, SPT will pay one-twelfth of 10 percent of said joint facility valuation monthly divided by the number of railroads using the trackage.

c. It is the intention of the parties hereto that the merged company will handle SP traffic to and from Rivergate. However, SP shall have the right to handle its own traffic to and from Rivergate with its own locomotives and cars at any time, subject to the provisions of subparagraph b above.

d. Maintenance and operation expense will be paid by SP on a car-mile proportion of costs incurred by BN for maintenance, operations, and taxes.

e. Joint facility valuation of the subject trackage including land value is approximately $6.6 million at the present time. This value is subject to more precise determination at the time the agreement is executed.

f. Obtaining operating or trackage rights for the benefit of SP over lines of railroads owned by other than the merged company or controlled subsidiaries necessary for SP access to Rivergate will be the sole responsibility of SP. The merger company will cooperate with SP in seeking any such rights.

2. SP as successor to the Texas and New Orleans Railroad Company (T&NO) hereby consents to the merged company succeeding Frisco as tenant over lines of the SP (formerly T&NO) between Sherman and Denison, TX, as more fully described in a contract by and between T&NO and the St. Louis, San Francisco, and Texas Railway Company (merged into Frisco January 20, 1964), dated August 20, 1953. Upon merger of BN and Frisco, the merged company will acquire all rights and obligations now held by Frisco under said agreement.

UP

1. The new consolidated company shall establish and maintain routes, rates, and transit arrangements on grain and grain products via BN-Butte-Silver Bow, MT-UP between its points in Montana, North Dakota, and Minnesota, on the one hand, and UP points in Utah, Nevada, California, on the other hand. Transit arrangements will be consistent with BN transit arrangements maintained to other west coast markets or to the same market via other routes. Rates on these newly established routes shall be no higher than those via any other routes in which the new consolidated company participates between the same points. With respect to these new rates via Butte-Silver Bow, the new consolidated company and UP will in good faith negotiate divisions of revenues.

2. Following merger, applicants shall concur in the publication of the following language in all relevant Western Trunk Line, Southwestern Lines, other rate bureau tariffs, and individual line tariffs in which they participate and shall not oppose the taking effect of the following tariff language, the purpose of which is to maintain the existing UP-Frisco traffic interchange at Kansas City, MO/KS:

Except as otherwise provided, rates and charges from or to UP points in Colorado and Wyoming moving via UP through Dale, WY, as authorized in this tariff (or in other tariffs covering routing provisions as authorized), will not apply when interchanged with the BN at Denver, CO, and having prior or subsequent movement via Kansas City, MO/KS on traffic moving from, to or via the former St.Louis-San Francisco Railway.

3. UP will implement the previous condition by sending the letter, or variations thereof, that appears as appendix A to its stipulation with BN to the chairman of the Western Trunk Line. The new consolidated company shall adopt all such tariffs and tariff amendments and take all other additional action necessary or appropriate to implement this condition.

4. It is understood by the new consolidated company and UP that traffic will be delivered to or received from UP at Grand Island, NE, consistent with the rate and route provisions as currently published in the various applicable tariffs listed in appendix B to the stipulation between UP and BN.

II. BY CARRIERS THROUGH COMMISSION IMPOSITION OF CONDITIONS

A. Milwaukee Road

1. Granting of trackage rights over BN lines to Milwaukee Road to enable Milwaukee Road with its own trains, power and crews to serve all existing coal mine facilities located on the Colstrip and Kuehn branches of BN in Montana, to be applicable only on movements to Milwaukee Road destinations and industries (including destinations and industries served by the Milwaukee Road at common points with BN) also to destinations on connecting lines that are not served by BN; upon such fair and reasonable terms as BN and Milwaukee may agree upon, or as may be prescribed by the Commission in the event of their failure to agree.

2. Monthly cash indemnification of Milwaukee Road traffic losses proved as a result of the Northern Lines merger since 1970 and as a result of the BN/Frisco merger if approved, including absorption by BN of the cost of labor protection, if any, for Milwaukee Road employees furloughed as a result of traffic losses to BN.

3. Allowing BN to reduce its indemnity to Milwaukee Road to the extent of net new revenues accruing to Milwaukee Road by reason of traffic protective conditions imposed herein.

4. Require BN to pay to Milwaukee Road $100,000 in liquidated damages for each violation of any merger condition.

5. Require the BN to allow the Milwaukee Road the right to allow other railroads to use, lease, sublease, or buy Milwaukee Road's rights in all joint facility agreements with BN.

6. The so-called DT&I conditions should be required with the following additions:

a. The conditions should apply to the merged company and its controlled subsidiaries.

b. Neither the merged company nor its subsidiaries shall do anything to restrain or curtail the rights of present or future industries located on the lines of the merged company or its subsidiaries to route traffic via existing gateways or via existing routes or routes to be established in the future. The merged company and its subsidiaries shall preserve to Milwaukee Road the opportunity to participate in through routes and on all future traffic (including new movements and new commodities) to the same

extent as Milwaukee Road is able to participate in such through routes and rates on existing traffic at the time of merger. For purposes of this condition it shall be immaterial whether the previous movement occurred on class rates, commodity rates, or any other type of rate by whatever name it is described. It shall also be immaterial how the previous movement was packaged or whether it moved in bulk, what type of equipment was used to transport it, whether the commodity in question moved previously in the same or a different form, whether the commodity in question was precisely the same or a different grade of the same basic commodity, or whether the previous or subsequent movements occurred in less-than-carload, carload, multiple carload, so-called trainload, unit train or in any other volume quantity by whatever name said movement shall be known, it being the intent of this condition to maintain the commercial flow of commodities, without regard to the form of movement or the name applied to it.

c. The merged company shall not provide any service to or from interchange tracks with Milwaukee Road, including line-haul service to and from such interchange tracks, which is inferior to the service of the parties to the merger or their subsidiaries prior to the date the merger application was tendered for filing with the Commission.

d. The merged company and its subsidiaries shall offer rates, routes and service on present and future traffic over interchange points with Milwaukee Road on the same basis as the parties to the merger or their subsidiaries offer for competitive traffic in connection with other carriers and other gateways. If the merged company or its subsidiaries establish through routes and rates which extend its route beyond junctions where Milwaukee Road has been a connecting carrier, the merged company will continue to join Milwaukee Road in routes and rates via former junctions, and will negotiate in good faith divisions of revenues via such routes.

e. The merged company and its subsidiaries, to the extent that they may legally do so, will require any other railroad which may be included in the merger to agree to the foregoing conditions.

B. *Rock Island*

1. Henry Crown and the Crown interests should be required forthwith to divest themselves of any and all interests in Rock Island.

2. That a compensatory traffic condition and guarantee be imposed upon the applicants to protect and make whole Rock Island, not only from the diversion which is to be anticipated as shown from the face of the applications, but also such additional diversion as will be established by Rock Island evidence. This condition may take the form of a guarantee of Rock Island traffic or a cash payment in compensation for traffic losses.

3. Grant trackage rights from Denver to Golden, CO. Allow direct access to all industries.

4. DRI&NW Railroad (The DRI Line) from Davenport to Clinton, IA—secure BN and Milwaukee Road (joint owners) permission to open all industries to reciprocal switching. If Milwaukee Road is not agreeable, the ROCK would take over the BN interest in the line and thus acquire direct access to the industry.

5. Division and routing conditions:

BETWEEN BN STATIONS NAMED IN SECTION 1, WTL D/S 1018 AND ROCK STATIONS NAMED IN SECTION 2 OF WTL D/S 1018 WHEN INTERCHANGED BETWEEN BN (BN-SLSF) AND ROCK ISLAND OR BN (BN-SLSF MERGED

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SYSTEM) AND MNS-ROCK ISLAND. Apply a direct break at the point of interchange between BN (BN-SLSF merged system) and ROCK or BN (BN-SLSF merged system) MNS-ROCK on basis of Docket 31503, Column 3, for BN, and Docket 31503, Column 1, for ROCK or MNS-ROCK, using Short Line distance east and west of the interchange point.

BETWEEN BN STATIONS NAMED IN SECTION 1, WTL D/S 1017 AND EASTERN STATIONS NAMED IN TEA-ER D/S 514 WHEN INTERCHANGED BETWEEN BN (BN-SLSF MERGED SYSTEM) AND ROCK ISLAND OR BN (BN-SLSF MERGED SYSTEM) AND MNS-ROCK ISLAND. Deduct authorized proportion east of WTL-CTR Gateways and subdivided the proportion west on a direct break over point of interchange on basis of Docket 31503, Column 3, for BN, and Docket 31503, Column 2, for ROCK or MNS-ROCK, using Short Line miles east and west of the interchange point.

LUMBER—BN NORTH COAST ORIGINS TO SOUTHERN FREIGHT ASSOCIATION TERRITORY. Amend TCFB Tariff 17-V by publishing routing from BN-North Coast origins to Southern Freight Association Territory via BN-C&S-Amarillo-ROCK-Memphis thence connections.

LUMBER—BN NORTH COAST ORIGINS TO ROCK TEXAS AND OKLAHOMA DESTINATIONS. Amend TCFB Tariff 18-Series by publishing additional routing via BN-C&S-FWD-Amarillo or Dalhart thence ROCK when to Rock Island, Texas, and Oklahoma Panhandle stations. When to other Rock Island, Oklahoma, and Texas stations, publish additional routing via BN-Denver—ROCK and BN-C&S-FWD-Amarillo-ROCK. To ROCK destinations in Colorado, Kansas and Nebraska, publish additional routing via BN-Denver-ROCK.

LUMBER—BN NORTH COAST ORIGINS TO ROCK DESTINATIONS IN ARKANSAS AND LOUISIANA. Amend TCFB Tariff 28-P by publishing additional routing via BN-Denver-ROCK and BN-C&S-FWD-Amarillo-ROCK when to Rock, Arkansas and Louisiana destinations.

6. DT&I conditions:

By a document stipulation dated April 17, 1978, BN and Frisco have entered into an agreement with Missouri-Pacific Railroad Company for the imposition of modified DT&I conditions.

Paragraphs 7 and 8 on page 3 of such stipulation are an apparent attempt on the part of Mopac to reinforce the ususal DT&I conditions. Experience has indicated that some merged carriers tend to evade and avoid the intent and purpose of the DT&I conditions by alleging that the conditions do not apply to new rates or new commodities, new volume shipments or any other modifications of the traffic or rates on file at the time the merger became effective. In order to make the two stipulated paragraphs more definite and certain, it is suggested that the following is posed in addition to the ususal DT&I conditions for the benefit of Rock Island.

The consolidated company shall preserve the opportunity to participate in through routes and rates on future traffic (including new movements as well as present movements, the intent being that the gateway be fully open and activated as to all traffic moving at any future time regardless of its involving new commodities, new weights or car multiples, new origins or destinations, all to completely preserve opportunity of participation and all movements through the gateway) to the same extent as Rock Island would have been able to participate if there had been no merger.

If the new consolidated company establishes through routes and rates which extend its routes beyond junctions where Rock Island has been a connecting carrier, the new consolidated company will continue to join Rock Island in routes via the former junctions and will negotiate in good faith divisions of revenues via such routes. Such junctions will include all common points now or in the future existing between BN, Frisco or their affiliates or subsidiaries or with the merged company.

C. Rio Grande

1. DRGW requests that the DT&I conditions be imposed and that such conditions be worded so that they cover all present and future traffic of any kind and nature whatsoever handled by the applicant carriers.

2. In the event routing conditions 9 and 10 requested by UP in its "Initial List of Specific Protective Conditions" dated April 25, 1978, and filed herein are granted, DRGW requires competitive routing conditions be granted by BN and imposed upon UP (as an intermediate carrier) as follows:

a. The merged company shall establish and maintain routes to and from BN stations west of the Cascades in Oregon, Washington and British Columbia via BN-Wallula, Washington-UP-Ogden, Salt Lake City, Provo or Clearfield, UT; thence DRGW or DRGW and connections east of Denver, Colorado Springs or Pueblo, CO.

b. The merged companies shall establish and maintain routes from or to points on the BN in Oregon, Washington, Idaho and British Columbia east of the Cascades via BN-Wallula, WA, UP-Ogden, Salt Lake City, Provo or Clearfield, UT; thence DRGW or DRGW and connections east of Denver, Colorado Springs, or Pueblo, CO.

c. In connection with both of these conditions, the rates on these newly established routes shall be no higher than any other routes in which the merged companies participate between the same points.

d. Divisions of revenue must be mutually agreed upon for traffic via these routes and in the event agreement cannot be reached, the ICC shall determine equitable divisions. Also, since Clearfield; UT, is not a regular interchange point between the UP and DRGW, the requested routing to or via Clearfield, UT, is only desired in connection with shipments granted transit privileges at Clearfield. Thus, shipments moving via BN-UP to Clearfield, UT, for transit could move beyond via DRGW or DRGW and connections.

3. The Commission shall retain jurisdiction over these proceedings following consummation of the transactions herein authorized, for the purpose, among others, of considering petitions under 49 U.S.C. 11344(c) of the act by any railroad in the territory involved requesting inclusion in the merger so authorized. The Commission shall also retain jurisdiction over these proceedings to impose such just and reasonable conditions upon petition by any party in interest, or on its own motion, after hearing, as may be necessitated by any cumulative or crossover problems stemming from approval of this merger and any other pending or future transaction authorized under 49 U.S.C. 11343, which when combined with this merger results in any adverse effect on a carrier in the territory involved. Consummation of the transactions herein authorized shall constitute irrevocable assent by applicants to the power of this Commission to impose, after hearing, such just and reasonable conditions as may be necessary or appropriate.

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D. *ICG*

1. A grant of ICG by the merged company of trackage rights over the present Frisco line between Memphis, TN, and Jasper, AL, to connect at Jasper, AL, with existing trackage rights which ICG has over Frisco between Jasper, and Birmingham, AL. Under this condition, ICG would only serve the station at Tupelo, MS. Any trackage rights agreement entered into by and between the parties pursuant to this condition shall provide that the merged company would not discriminate against ICG in the operation of trains over the line between Memphis, TN, and Birmingham, AL, and that ICG's trains on said tracks would have equal rights to those of the merged company. ICG will also require westbound blocking at the joint ICG-Frisco Birmingham Yard adequate to facilitate efficient utilization of the trackage rights.

2. The so-called DT&I conditions should be required plus any modifications or extensions thereto which may be required for the protection of railroads generally in this proceeding, plus the following additions:

a. The conditions should apply to the merged company and its controlled subsidiaries.

b. Neither the merged company nor its subsidiaries shall do anything to restrain or curtail the right of present or future industries located on the lines of the merged company or its subsidiaries to route traffic by existing gateways or by existing routes to be established in the future.

The merged company and its subsidiaries shall preserve to ICG the opportunity to participate in through routes and rates on future traffic (including new movements and new commodities, as well as present movements) to the same extent as ICG would have been able to participate prior to the merger.

For purposes of this condition it shall be immaterial whether the previous movement occurred on class rates, commodities rates, or any other type of rate by whatever name it is described. It shall also be immaterial how the previous movement was packaged or whether it moved in bulk, what type of equipment was used to transport it, whether the commodity in question moved previously in the same or a different form, whether the commodity in question was precisely the same or a different grade of the same basic commodity, or whether the previous or subsequent movements occurred in less-than-carload, carload, multiple carload, so-called trainload, unit train or in any other volume quantity by whatever name said movement shall be known, it being the intent of this condition to maintain the commercial flow of commodities, without regard to the form of the movement or the name applied to it.

c. The merged company and its subsidiaries shall offer rates, routes and service on present and future traffic over interchange points with ICG on the same basis as the parties to the merger or their subsidiaries offer for competitive traffic in connection with other carriers and other gateways.

If the merged company or its subsidiaries establish through routes and rates which extend its route beyond junctions where ICG has been a connecting carrier, the merged company will continue to join ICG in routes via the former junctions, and will negotiate in good faith divisions of revenues via such routes.

d. Upon written request of ICG, the merged company shall establish joint routes and rates and fair and reasonable divisions with ICG and its connections upon such traffic as ICG shall designate via junctions of ICG with the merged company named in the list of ICG freight connections and junction points in the "Official Railway Equipment Register ICC-RER No. 407" or reissues thereof or any of such junctions

designated by ICG at the same rate level maintained by the merged company on traffic moving via competitive routes and junctions. Such rates and routes will include, but not be limited to, those applying for local movement over the lines of the merged company or for local movement over the lines of any of the predecessor companies. The merged company shall not make any changes in schedules or operations which would increase time in transit over the lines of the merged company via these interchange routes or would handicap such routes in any respect and shall not take any other action which would result in downgrading the standards of service prevailing via such routes on or prior to the date the BN-Frisco merger application was tendered for filing with the Commission. If the parties are unable to agree on divisions, the joint routes and rates shall be put into effect subject to determination by the ICC of appropriate divisions.

e. Neither the merged company nor any subsidiary shall provide any service to or from interchange tracks with ICG, including line-haul service to and from such interchange tracks, which is inferior to the service of the parties to the merger or their subsidiaries prior to the date the merger application was tendered for filing with the Commission.

f. The coordinated service interchange arrangements between BN and ICG at Centralia, IL, shall be maintained unless cancellation is made or agreed to by ICG. Under the present arrangement, all traffic moving from, to, or via stations on BN located north or west of Galesburg, IL, on the one hand, and from, to, or via ICG stations located south of Carbondale, IL, on the other hand, will be interchanged at Centralia, IL. Service between Galesburg, IL and such interchange shall be at published schedules not inferior to those existing on the date the BN-Frisco merger application was tendered for filing with the Commission, unless otherwise agreed to by ICG. Traffic originated on BN or moving via BN thence ICG or ICG and connections, which would be routed via Centralia, IL, under the terms of this arrangement, shall continue to be so routed unless otherwise agreed to by ICG and the merged company shall not solicit the movement of such traffic via junctions south of Centralia, IL.

3. ICG shall have the right to serve physically with its own engines and cars all private sidings, public delivery tracks, and other facilities on the Birmingham, AL, terminal, for which Frisco now provides switching service for ICG under the joint facility agreement dated January 1, 1966, as amended. ICG shall also have the right to serve any new private sidings, public delivery tracks, or other facilities that may subsequently be located or connected with this trackage. In the event ICG chooses to exercise this right, switching schedules for both ICG and the merged companies shall be as mutually agreed upon. The exercise of these rights by ICG shall in no way impair ICG's other rights under the joint facility agreement dated January 1, 1966, as amended, other rights prescribed therein.

4. Grant ICG the right to operate its road trains between a point where ICG's track in Memphis connects with Mopac near Broadway Street to a point designated as K.C. Junction, a distance of approximately 10,364.5 feet more or less.

E. MKT

1. *Indemnity for loss of revenue.*

a. If the application herein is approved, the company resulting from the merger of BN and Frisco ("the merged BN company") shall be required to pay MKT annually an amount of money sufficient to indemnify MKT for the financial loss sustained by MKT

as a result of the diversion of traffic from MKT to the merged BN system (i.e., the merged BN company and its subsidiaries, FW&D and C&S), such indemnification to be determined as follows:

(1) The Commission's order herein shall determine:

(i) The gross revenue received by MKT from traffic handled in 1976 by MKT in conjunction with any one or more of BN, Frisco, FW&D, and C&S;

(ii) The probable annual loss to MKT, by reason of the merger, of gross freight revenue in respect of the traffic referred to in (i) above;

(iii) The probable annual loss to MKT, by reason of the merger, of gross freight revenue in respect of all traffic other than that referred to in (i) above; and,

(iv) The savable cost to MKT of transporting the traffic which would be lost by reason of the merger as found in (ii) and (iii) above; i.e., the cost which MKT would save if such traffic had not been transported by MKT, expressed as a percentage of the aggregate revenue loss found in (ii) and (iii) above. The difference between 100 percent and the savable cost is hereinafter called the "indemnification factor."

(2) In respect of each calendar year through and including 1997 following consummation of the merger herein sought, indemnity shall be payable by the merged BN company to MKT on account of any deficiency in MKT's traffic subject to diversion by reason of this merger. For the purposes of this provision, a deficiency shall exist in respect of any such year in the amount, if any, by which MKT's gross freight revenue for such year from traffic handled by MKT in conjunction with the merged BN system (not including any traffic transported by MKT to or from the Lower Colorado River Authority near La Grange, TX, or the Grand River Dam Authority near Pryor, OK) is less than the sum of (a) the gross freight revenue found in 1(i) above and (b) the amount of the revenue loss found in (1)(iii) above (all as recomputed as provided in (3) below); provided, however, that the first calendar year following such merger the amount to be added under clause (b) hereof shall be only 65 percent of the amount of the revenue loss found in 1(iii) above (all as recomputed as provided in (3) below). In the event of any such deficiency, indemnity shall be paid in cash to MKT by the merged BN company within 120 days following the close of such calendar year in an amount equal to the deficiency multiplied by the indemnification factor. In the event the merger is effectuated other than at the end of a calendar year, the indemnity for the portion of the calendar year in which the merger becomes effective and for the next succeeding calendar year will be appropriately determined in accordance with the foregoing formula.

(3) In order to take into account any general rate increase occurring after 1976, the gross revenue calculated in 1(i) and 1(iii) above shall be recomputed at the end of each subsequent year by increasing same by the percentage of increase in the general rate level in effect in respect of such calendar year pursuant to authorization by the Commission over the general rate level in effect during 1976.

b. The Commission will reserve jurisdiction to review and revise the foregoing for good cause shown based on changed conditions.

2. *Traffic conditions*

a. All existing routes, corresponding junctions, and gateways between MKT and BN, Frisco, FW&D, and C&S shall be maintained and kept open on *all* existing and future traffic to, from, and via points served by MKT; and with respect to traffic in which MKT can presently participate with applicants on the basis of a class rate, any newly published rates of applicants, whether class, commodity, exceptions, or otherwise, shall also be applicable from or to points and via junctions served by MKT; and in the

event of any new stations hereafter opened on applicants' lines, MKT shall be permitted routing and revenue to and from such new stations reflecting the same routes and revenue divisions to MKT as on traffic to and from existing stations. Specifically, this condition is intended to prohibit the merged system from maintaining single-line rates on traffic in which MKT now participates by joint rates, lower than the joint rates in which MKT may participate or with divisions thereof constituting a reduction of the MKT's present divisions (in dollars) of such rates.

b. The present neutrality of handling traffic inbound and outbound by each railroad company in the merged system shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of those carriers without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

c. The present traffic and operation relationships, including, among other things, interchange arrangements and switching practices, between each railway company in the merged system on the one hand, and all lines connecting with their tracks on the other hand, shall be continued.

d. Each railroad company in the merged system shall accept, handle, and deliver all cars inbound and outbound, loaded or empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route or movement.

e. Each railroad company in the merged system shall not do anything to restrain or curtail the right of industries now located on lines of any of them to route traffic over any or all existing routes and gateways.

f. The merged company or its subsidiary companies, to the extent that they may legally do so, will require any other railroad which may be included in the merger to agree to the foregoing conditions.

F. Soo Line

1. Upon the written request of the Soo Line, the merged company shall establish joint routes, rates and fair and reasonable divisions with the Soo Line and its connections upon such traffic as the Soo Line shall designate via junctions at Minot, ND, Bismarck, ND, Detroit Lakes, MN, Erskine, MN, and Thief River Falls, MN, at the same rate level maintained by the merged company on competitive traffic moving via other competitive routes and junctions. The merged company shall provide competitive train service for traffic interchanged with the Soo Line at said junctions. If the parties are unable to agree on divisions, the joint routes and rates shall be put into effect subject to Commission determination as to the appropriate division.

2. Trackage rights between Minneapolis, MN, and Superior, WI.

3. Trackage rights between Bemidji, MN, and Superior, WI.

4. Trackage rights between McGregor, MN, and Superior, WI.

For conditions 2-4 Soo Line shall pay its use proportion (determined by relative freight car units) of the expense incurred for the maintenance and operation of any lines over which it obtains such operating rights but shall not pay a return on the merged company's net investment. The Soo Line shall not handle any traffic to and from any points served by said lines not formerly served by the Soo Line.

5. At the option of the Soo Line, the merged company and Soo Line shall terminate that certain agreement dated April 15, 1929 between Northern Pacific Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railroad Company as amended by supplemental agreement dated March 2, 1970, under which the parties

pool iron ore tonnage originating on the Cuyuna Range, and the Soo Line shall be relieved of all obligations imposed upon it by said agreement. Such termination shall be effective 3 months after written notice served by Soo Line upon the merged company, but such termination shall not be effective prior to the effective date of any necessary Commission order approving cessation of Soo Line operations over said line.

6. The merged company shall release the Soo Line from all obligations under the agreement dated March 17, 1906 between predecessor companies, the Great Northern Railway Company and Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, relating to Soo Line tunnel under the BN tracks in St. Paul, MN, if and when a Commission decision is made and entered authorizing abandonment of Soo Line operations through said tunnel.

7. The so-called DT&I conditions should be required with the following additions:

a. The conditions should apply to the merged company and its controlled subsidiaries.

b. Neither the merged company nor its subsidiaries shall do anything to restrain or curtail the rights of present or future industries located on the lines of the merged company or its subsidiaries to route traffic via existing gateways or via existing routes or routes to be established in the future.

The merged company and its subsidiaries shall preserve to Soo Line the opportunity to participate in through routes and rates on all future traffic (including new movements and new commodities) to the same extent as Soo Line is able to participate in such through routes and rates on existing traffic at the time of merger.

For purposes of this condition it shall be immaterial whether the previous movement occurred on class rates, commodity rates, or any other type of rate by whatever name it is described. It shall also be immaterial how the previous movement was packaged or whether it moved in bulk, what type of equipment was used to transport it, whether the commodity in question moved previously in the same or a different form, whether the commodity in question was precisely the same or a different grade of the same basic commodity, or whether the previous or subsequent movements occurred in less-than-carload, carload, multiple carload, so-called trainload, unit train or in any other volume quantity by whatever name said movements shall be known, it being the intent of this condition to maintain the commercial flow of commodities, without regard to the form of the movement or the name applied to it.

c. The merged company shall not provide any service to or from interchange tracks with Soo Line, including line-haul service to and from such interchange tracks, which is inferior to the service of the parties to the merger or their subsidiaries prior to the date the merger application was tendered for filing with the Commission.

d. The merged company and its subsidiaries shall offer rates, routes and service on present and future traffic over interchange points with Soo Line on the same basis as the parties to the merger or their subsidiaries offer for comeptitive traffic in connection with other carriers and other gateways.

If the merged company or its subsidiaries establish through routes and rates which extend its route beyond junctions where Soo Line has been a connecting carrier, the merged company will continue to join Soo Line in routes via the former junctions, and will negotiate in good faith divisions of revenues via such routes.

e. The merged company and its subsidiaries, to the extent that they may legally do so, will require any other railroad which may be included in the merger to agree to the foregoing conditions.

8. Subject to the approval of the Commission, the merged company shall grant to the Soo Line operating rights over a grain gathering line or lines connecting with Soo Line which produce annual average gross grain revenues equaling the Soo Line's uncompensated annual loss of gross revenues caused by the merger. Average annual gross grain revenues shall be determined by averaging such revenues over the most recent 3-year period available. Upon granting said operating rights, the merged company shall seek the necessary authority of the Commission to abandon its operations over said line or lines upon the effective date of the Commission's approval of operations by the Soo Line.

9. The Commission shall retain jurisdiction to resolve any controversies between the merged company and Soo Line as to the correct interpretation of said conditions and to establish fair and reasonable terms of any agreements required to carry out any of said conditions.

III. BY EMPLOYEE GROUPS THROUGH COMMISSION IMPOSITION

A. *UTU*

The conditions sought are the "attrition conditions" imposed in *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967).

B. *RLEA*

ARTICLE I

Labor protective conditions to be in railroad abandonments or discontinuances pursuant to 49 U.S.C. 10903, (formerly section 1(a) of the Interstate Commerce Act), or transactions authorized pursuant to 49 U.S.C. 11343, *et seq.* (formerly section 5(2) and 5(3) of the act) except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

The scope of and purpose of this appendix is to provide for fair and equitable arrangements to protect the interests of employees of railroads affected by actions taken pursuant to authorizations or approvals, of this Commission to which this appendix has been imposed. Therefore, fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of this appendix.

1. *Definitions.*—

(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of a railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of a railroad who, as a result of a transaction is deprived of employment with his employing railroad as his point of employment because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for benefits under section 6 of this

article for any particular employee shall not continue for a longer period following the date he was dismissed than the period during which such employee was in the employ of the railroad prior to the date of his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both such conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement; shall be construed to include the conditions, responsibilities, and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement.

4. *Notice and agreement or decision.*—

(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of any party interested in such intended transaction either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. *Displacement allowances.*—

(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position, which does not require a change in residence, producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during the protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall by determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed compensated services more than fifty (50) percentum of each such months immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided* that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—

(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he performed compensated service more than fifty (50) percentum of each such month immediately prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with a railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a regular, bulletined, comparable position in his same craft or class, which does not require a change in his place of residence, for which he is qualified and eligible with the railroad from which he was dismissed, after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. *Separation allowance.*—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, or of an arbitration award establishing that he is a dismissed employee, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936. Until such lump sum payment is received, the dismissed employee shall receive a dismissal allowance in accordance with section 6 of this appendix (see article I, section 5).

8. *Fringe benefits.*—No employee of a railroad who is affected by a transaction shall be deprived of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. *Moving expenses.*—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of a transaction, and who is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss, during the time necessary for such move, and for a reasonable time thereafter, not to exceed three (3) working days. The exact extent of the responsibility of the railroad under this provision, and the ways and means of transportation shall be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however,* that changes in place of residence which are not a result of a transaction, shall not be considered to be within the purview of this section; *provided further,* that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No

claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

10. Should a railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. *Arbitration of disputes.*—

(a) In the event a railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 30 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other or others of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest office designated by the railroad, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree unanimously upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree unanimously to a method by which a neutral member shall be appointed, and, failing such agreement, any party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives; *provided, however,* that the decision in said case shall be made by the neutral member.

(c) The decision, by majority vote (except as provided for in paragraph (b) of this section), of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.*—

(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall, at his option, be reimbursed by the railroad for any loss including real estate commissions, loan placement fees, et cetera, suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be

determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) The employee may elect to waive the provisions of paragraph (a)(i) of this section and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in the jurisdiction in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed $3,000 or 6 percentum of sales price, whichever is less), and any prepayment penalty required by the institution holding the mortgage.

(iii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iv) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, the loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee whose employment is terminated or who is furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on any railroad involved in the transaction, which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of this article II fails without good cause within 10 calendar days after actual receipt of notice to accept an offer of a position comparable to that which he held when his employment was terminated or he was furloughed, for which he is qualified, or for which he has satisfactorily completed such training, and which does not require a change in residence, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of a railroad whose position is not within the scope of a collective bargaining agreement shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under the terms and conditions of this appendix.

In the event any dispute or controversy arises between a railroad and an employee whose employment is not within the scope of a collective bargaining agreement, with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to this Commission for resolution.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Moreover, it is the intent of this appendix to provide protections which are fair and equitable. Thus, the terms of this appendix are to be interpreted in a fair and equitable manner, and are to be construed in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected, and such unenforceable provision shall be resubmitted to this Commission for modification or other appropriate action.

IV. BY OTHER PARTIES

A. Garvey

1. All present routes and transit arrangements which are published by the railroads serving Garvey's clients' facilities as enumerated in exhibit 1 of the list of protective conditions filed April 26, 1978, including soybeans in effect via routes from BN origins to its connections, from origins on the Frisco and its connections, as published in agency tariffs and in the individual railroad tariffs of the railroads listed in exhibit 1 of the list of protective conditions filed April 26, 1978, to be protected and maintained subsequent to the current merger proceeding.

2. If the merger is consummated, that BN and Frisco refrain from putting into effect any single-line rates and routes which would jeopardize the existing joint-line rates and routes and divisions to the extent that said joint-line rates, routes and divisions would become "paper rates."

3. When the grains and soybeans that are presently listed in the transit tariffs of the railroads in previously described exhibit 1 are brought into Garvey's clients' facilities from BN origins in Kansas, Nebraska, or Iowa, are stored and subsequently reshipped to gulf ports, said ports which may be served by the FW&D, a subsidiary line of the BN, the combination of routes which may be utilized today of BN-Frisco-FW&D be protected in the future with all transit privileges presently in effect by Frisco transit tariffs, competitive routes and rates be maintained with connections at Kansas City of the Santa Fe, Rock Island, Mopac, and Frisco for now and subsequent to the proposed merged system, if approved.

4. Garvey's clients who are located on the BN are experiencing a severe car shortage and said railroad cannot furnish all of the cars which are needed to move via the BN presently. If the merger is consummated, said clients desire protection that the BN will continue to furnish equipment and adequate service at their present BN locations.

5. *OT-5 authority.*—That the BN and Frisco railroads protect any OT-5 authority currently in effect which may be jeopardized if the merger is consummated. OT-5 authority is received from the AAR to move Garvey's clients' privately owned and/or leased equipment over the BN and Frisco railroads.

B. Board of Trade of Kansas City, MO, Inc.

1. Present routes and transit arrangements applicable to grain and grain products (including soybeans and products thereof) in effect via BN and its connections, and Frisco and its connections in individual line as well as agency tariffs be maintained and kept open for all existing and future traffic.

2. That no added single-line provisions be put into effect to compete with existing joint-line provisions that would jeopardize or prey on existing joint-line traffic and adversely affect it or perhaps dry it up.

C. Montana Wheat Research and Marketing Committee

1. Upon consummation of the proposed transaction, the merged companies and their carrier subsidiaries shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise mutually agreed upon by the carriers affected or otherwise authorized by the Commission.

2. The present neutrality of handling traffic inbound and outbound and in overhead service including any new and future traffic on the merged companies and their carrier subsidiaries shall be continued so as to permit equal opportunity for service to, from and via all lines reaching the rails of the merged companies and their carrier subsidiaries without discrimination in the arrangements of schedules or otherwise.

3. The present traffic and operating relationships and contracts (including, but not limited to, those relating to divisions and reciprocal switching) between the merged companies and their carrier subsidiaries, on the one hand, and, on the other, all Milwaukee Road lines connecting with their tracks, shall be continued insofar as such matters are within the control of the merged companies.

4. The merged companies and their carrier subsidiaries shall accept, handle, and deliver all cars inbound and outbound and in overhead switching service, loaded and

empty, without discrimination in promptness and frequency of service as between cars destined to or received from the Milwaukee Road, and irrespective of origin or destination or route of movement.

5. The merged companies shall not do anything to restrain or curtail the right of industries served by the merged companies or their carrier subsidiaries to route traffic over any or all available route and gateways of the Milwaukee Road.

6. The merged companies and their carrier subsidiaries shall preserve the opportunity of the Milwaukee Road to participate in through routes and rates on future traffic (including new movements as well as present movements) to the same extent as the Milwaukee Road would have been able to participate prior to merger.

7. If the merged companies or their carrier subsidiaries establish through routes and rates which extend their routes beyond junctions where the Milwaukee Road has been a connecting carrier, they will continue to join the Milwaukee Road in routes via former junctions.

8. Any party or person having an interest in the subject matter may at any future time petition for such modification in the above conditions as may be deemed in the public interest, and jurisdiction shall be retained to reopen the proceedings on the motion of the Commission for the same purpose.

9. All traffic routed over the Milwaukee Road, on the one hand, and the merged companies or their carrier subsidiaries, on the other hand, but unrouted as to junction points shall be delivered by the merged companies and their carrier subsidiaries at the nearest junction with Milwaukee Road where rates and routes apply, except to the extent Milwaukee Road may designate for service or other reasons a more distant junction point. In the event the merged companies or their carrier subsidiaries fail to protect the Milwaukee Road's long haul on traffic unrouted as to junction point in the manner described above, the merged companies or their carrier subsidiaries, as the case may be, shall afford the Milwaukee Road divisions as though the shipments involved actually moved via the Milwaukee Road long-haul junction.

D. Wyo-Ben, Inc.

1. Upon consummation of the proposed transaction, the merged companies and their carrier subsidiaries shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise mutually agreed upon by the carriers affected or otherwise authorized by the Commission.

2. The present neutrality of handling traffic inbound and outbound and in overhead service including any new and future traffic on the merged companies and their carrier subsidiaries shall be continued so as to permit equal opportunity for service to, from and via all lines reaching the rails of the merged companies and their carrier subsidiaries without discrimination in the arrangements of schedules or otherwise.

3. The present traffic and operating relationships and contracts (including, but not limited to, those relating to divisions and reciprocal switching) between the merged companies and their carrier subsidiaries on the one hand, and, on the other, all lines connecting with their tracks, shall be continued insofar as such matters are within the control of the merged companies.

4. The merged companies and their carrier subsidiaries shall accept, handle, and deliver all cars inbound and outbound and in overhead and switching service, loaded and empty, without discrimination in promptness and frequency of service as between cars destined to or received from competing carriers, and irrespective of origin or destination or route of movements.

5. The merged companies shall not do anything to restrain or curtail the right of industries served by the merged companies or their carrier subsidiaries to route traffic over any or all available routes and gateways.

6. The merged companies and their carrier subsidiaries shall preserve the opportunity to participate in through routes and rates on future traffic (including new movements as well as present movements) to the same extent as all other carriers including the Milwaukee Road would have been able to participate prior to merger.

7. If the merged companies or their carrier subsidiaries establish through routes and rates which extend their routes beyond junctions where the Milwaukee Road has been a connecting carrier, they will continue to join the Milwaukee Road in routes via former junctions.

8. Any party or person having an interest in the subject matter may at any future time petition for such modification in the above conditions as may be deemed in the public interest, and jurisdiction shall be retained to reopen the proceedings on the motion of the Commission for the same purpose.

9. All traffic routed over the Milwaukee Road, on the one hand, and the merged companies or their carrier subsidiaries, on the other hand, but unrouted as to junction points shall be delivered by the merged companies and their carrier subsidiaries at the nearest junction with Milwaukee Road where rates and routes apply, except to the extent Milwaukee Road may designate for service or other reasons a more distant junction point. In the event the merged companies or their carrier subsidiaries fail to protect the Milwaukee Road's long haul on traffic unrouted as to junction point in the manner described above, the merged companies or their carrier subsidiaries, as the case may be, shall afford the Milwaukee Road divisions as though the shipments involved actually moved via the Milwaukee Road's long-haul junction.

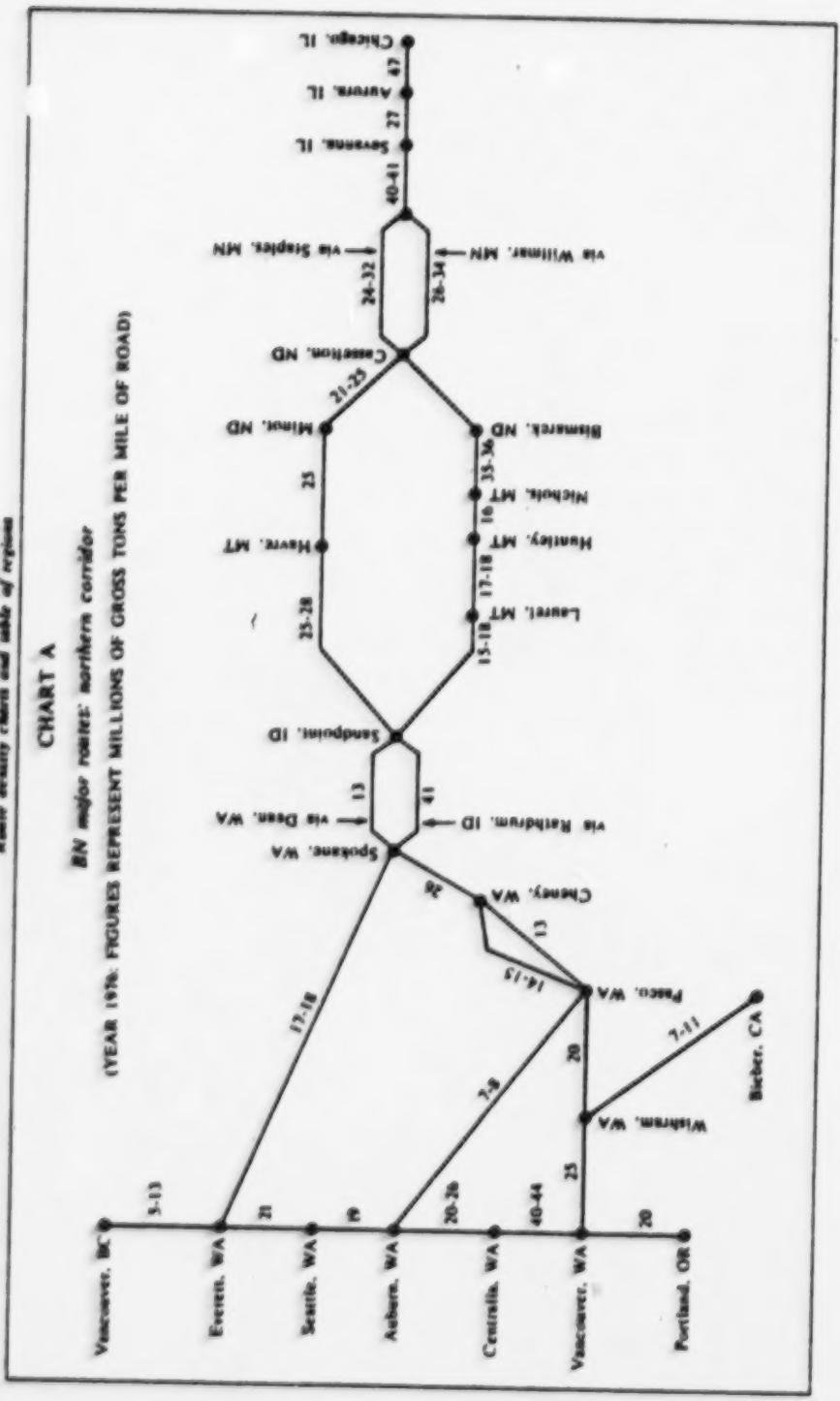
APPENDIX L

Route density charts and table of regions

CHART A

BN major routes: northern corridor

(YEAR 1976: FIGURES REPRESENT MILLIONS OF GROSS TONS PER MILE OF ROAD)



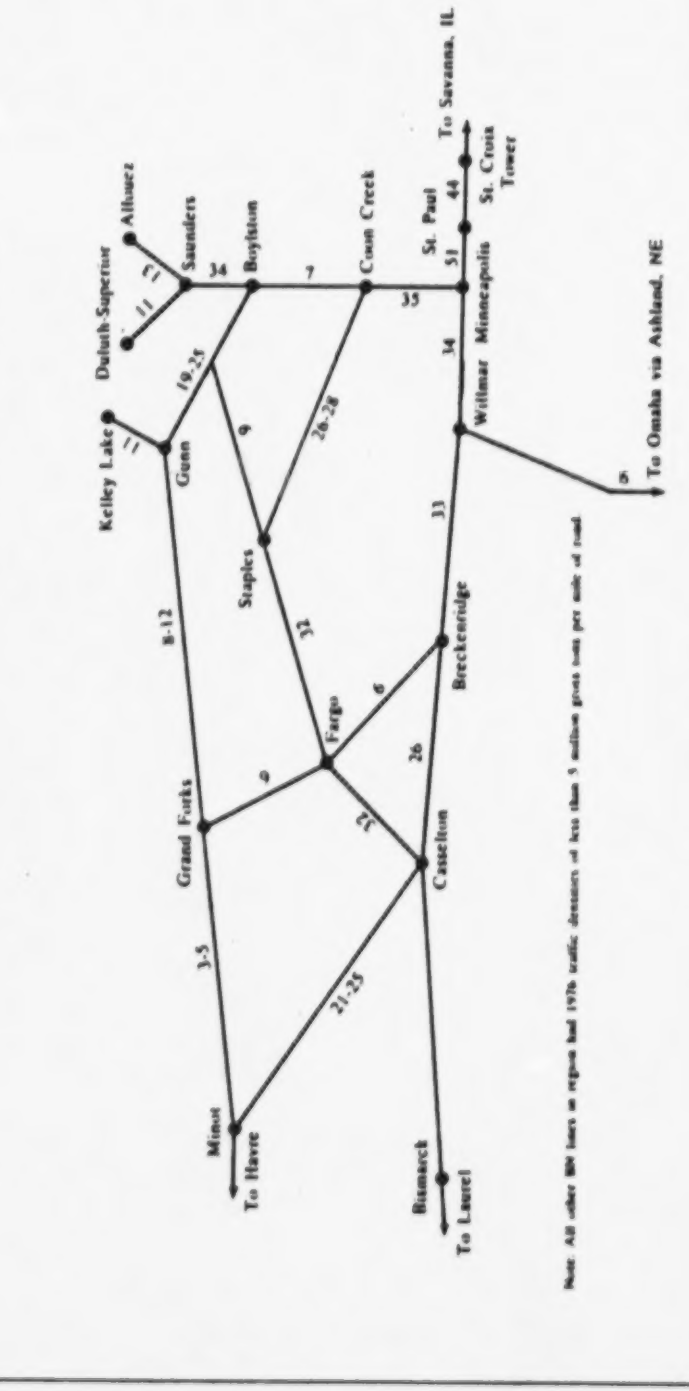
360 I.C.C.

Route density charts and table of regions—Continued

CHART B

BN major routes: Twin Cities region

(YEAR 1976: FIGURES REPRESENT MILLIONS OF GROSS TONS PER MILE OF ROAD)



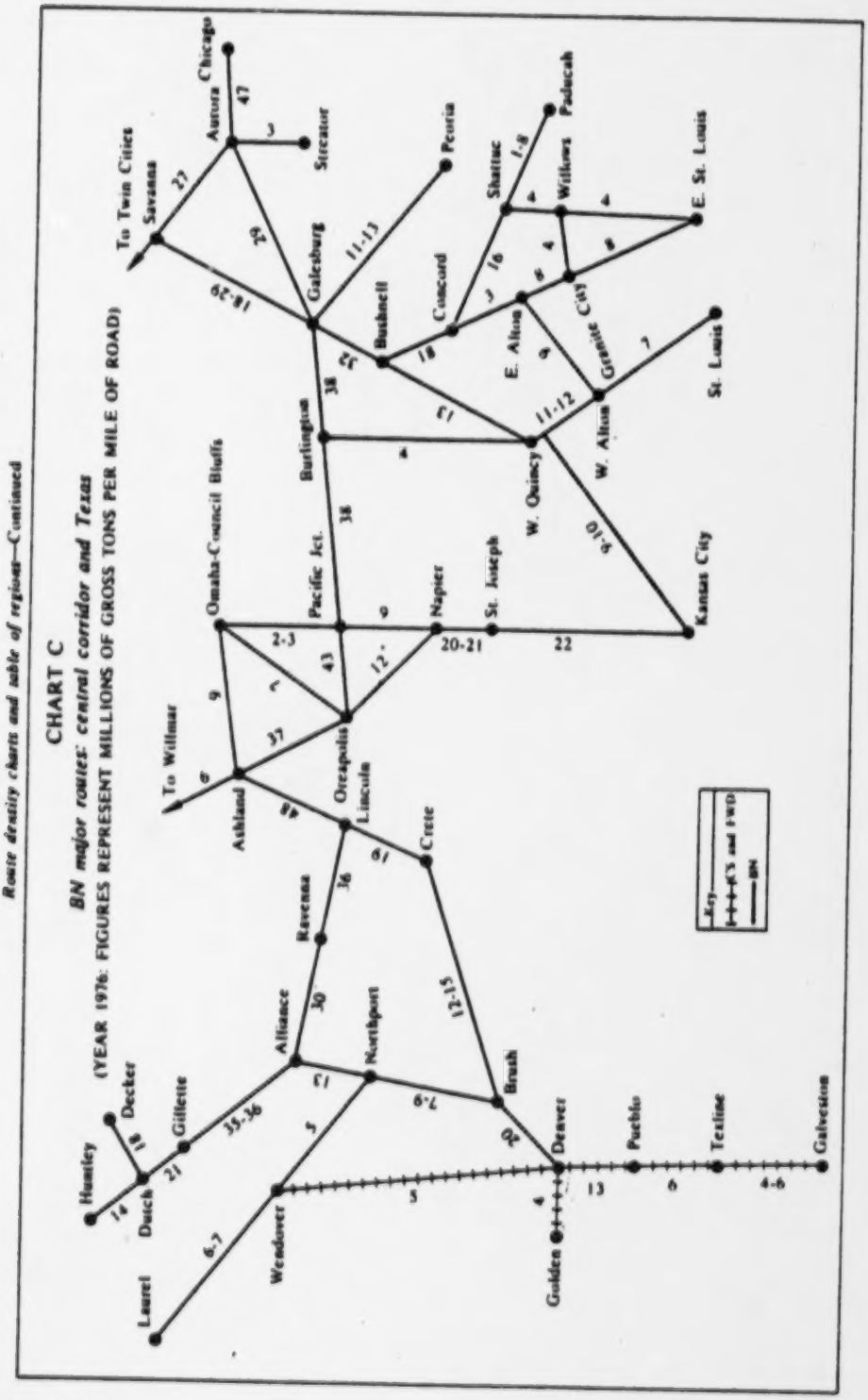
Note: All other BN lines in region had 1976 traffic densities of less than 5 million gross tons per mile of road.

Route density charts and table of regions—Continued

CHART C

BN major routes: central corridor and Texas

(YEAR 1976: FIGURES REPRESENT MILLIONS OF GROSS TONS PER MILE OF ROAD)



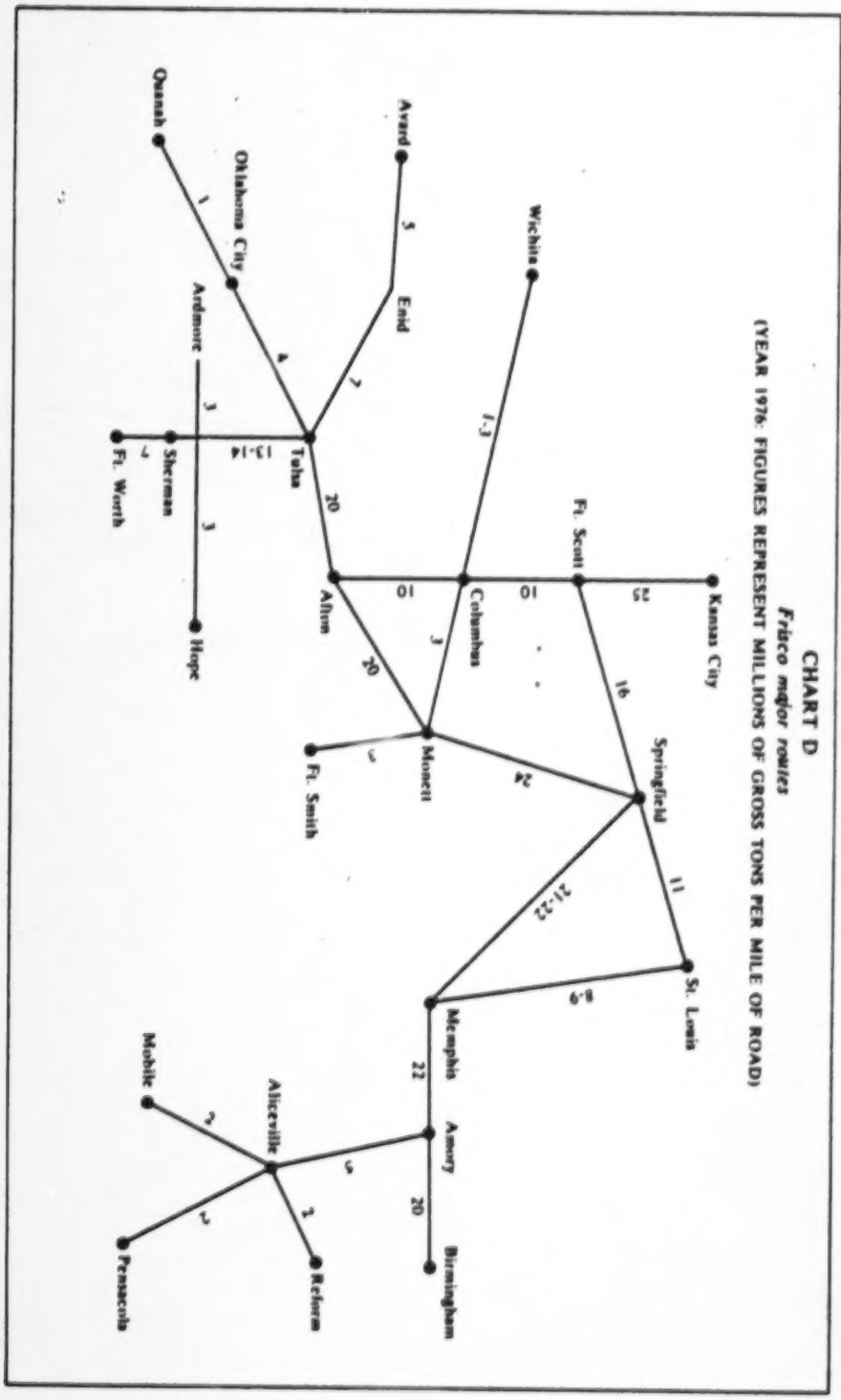
360 I.C.C.

Route density charts and table of regions—Continued

CHART D

Frisco major routes

(YEAR 1976: FIGURES REPRESENT MILLIONS OF GROSS TONS PER MILE OF ROAD)



The following multi-State regions will be utilized throughout this decision in connection with discussions of freight traffic flow and economic data, unless otherwise noted.

MULTI-STATE REGIONS

Northwest	*Northeast*
Idaho	Michigan
Oregon	Indiana
Washington	Illinois
Montana	Ohio
Wyoming	Maryland
	Pennsylvania
Southwest	New York
	New Jersey
California	Delaware
Nevada	Maine
Utah	New Hampshire
Arizona	Vermont
New Mexico	Massachusetts
Colorado	Connecticut
	Rhode Island
North-Central	*South-Southeast*[1]
North Dakota	
South Dakota	South Carolina
Minnesota	Florida
Iowa	Mississippi
Nebraska	Alabama
Wisconsin	Georgia
South-Central	*North-Southeast*[1]
Kansas	Tennessee
Oklahoma	North Carolina
Texas	Kentucky
Missouri	Virginia
Arkansas	West Virginia
Louisiana	District of Columbia

[1]The South-Southeast and the North-Southeast regions are collectively referred to as the Southeast at various points in this decision.

APPENDIX M

Protective conditions imposed

1. This condition applies to the merged company and its subsidiaries for a period of 2 years from the date of consummation of the merger for the benefit of all other railroads participating in this proceeding.[1]

[1]Santa Fe, C[illegible]W, Milwaukee Road, Rock Island, Family Lines, ICG, ITC, KCS, MKT, Mopac, Rio Grande, [illegible]o Line, SP-Cotton Belt, Southern, and UP.

a. All routes and channels of trade via existing junctions and gateways shall be maintained and kept open, unless and until otherwise authorized by the Interstate Commerce Commission.

b. The present neutrality of handling traffic inbound and outbound and in overhead service by applicants shall be continued by the new consolidated company so as to permit equal opportunity for service to and from all lines reaching the rails of the new consolidated company without discrimination in the arrangement of schedules or otherwise.

c. The present traffic and operating relationships existing between applicants, on the one hand, and all lines connecting with their tracks, on the other, shall be continued.

d. The new consolidated company shall accept, handle, and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received for competing carriers, and irrespective of destination or route of movement.

e. The new consolidated company shall not do anything to restrain or curtail the right of industires now or hereafter located on BN and Frisco and their subsidiaries to route traffic over any and all existing gateways.

f. The new consolidated company shall refrain from closing any existing route or channel of trade with any carrier, unless and until so authorized by the Commission.

g. The consolidated company shall preserve the opportunity to participate in through routes and rates on future traffic (including new movements as well as present movements) to the same extent as other carriers would have been able to participate prior to the merger.

h. If the new consolidated company establishes through routes and rates which extend its route beyond junctions where any of the carriers in footnote 1 have been a connecting carrier, the new consolidated company will continue to join those carriers in routes via the former junctions, and will negotiate in good faith divisions of revenues via such routes.

i. Applicants, to the extent that they may legally do so, will require any other railroad which may be included in the merger to agree to the foregoing conditions.

j. Any party or person having an interest in the subject matter may at any future time petition for such modification in the above conditions as may be deemed in the public interest, and jurisdiction shall be retained to reopen the proceedings on the motion of the Commission for the same purpose.

In addition to this condition, which is for the benefit of all carriers, BN, Frisco, and their subsidiaries shall abide by the following conditions for individual carriers.

2. Chicago and North Western.

a. Following merger of BN and Frisco, the merged company shall grant trackage rights to CNW between St. Paul, MN, and Superior, WI, over approximately 140.3 miles of BN trackage. The trackage extends in a generally northerly direction from Claymont to Superior (Saunders) via Hinckley and is more particularly described in the verified statement of Mr. C. E. Able appearing in the record as exhibit H-201. These trackage rights shall be bridge rights only and CNW will have no right to serve BN local industries situated on the described trackage. A precise description of the trackage over which rights will be granted and the terms and conditions governing the grant of said trackage rights will be fully set forth in a separate agreement which shall be filed with the Commission for approval when completed and executed. BN and CNW will fully support the grant of said trackage rights within the scope of the terms

of the aforementioned agreement. Said agreement, to be filed with the Commission for approval when completed and excuted, shall include in substance the following terms:

i. CNW will pay one-half of 10 percent of the agreed joint facility valuation monthly, divided by the number of railroads using the trackage.

ii. The initial joint facilities valuation of the subject trackage, including land value, is agreed by the parties to be $12,482,220.

iii. Maintenance and operation expenses will be paid by CNW on a car-mile proportion of costs incurred by BN for maintenance, operations, taxes and assessments.

b. Following merger of BN and Frisco, the merged company shall grant to CNW an option, exercisable during a 2-year period commencing on the date the merger is consummated, to enter into a 50-year lease pursuant to which CNW would lease from BN approximately 20 acres of land located within its Union Yard complex and which land is more particularly identified on the print attached to the stipulation. CNW shall purchase from BN for $346,821 the track materials, consisting mainly of trackage, turnouts and ties, which occupy said land and shall pay the cost of BN trackage rearrangements necessary to effectuate the lease and permit continued BN service and operations including, but not limited to, service to Union Elevator. All future track material installed by CNW shall remain the property of CNW. Under the lease CNW shall pay to BN, in equal monthly installments, an annual rental equal to 10 percent of the value of the land subject to the lease. The initial value of the land to be leased to CNW is agreed by the parties to be $1.25 per square foot on the effective date of the merger. The value of the land at lease commencement date shall be $1.25 per square foot increased by reference to the performance of the Consumer Price Index during the period between consummation of the merger and the lease commencement date. The land value shall be further escalated during the life of the lease at 5-year intervals by reference to the Consumer Price Index. The parties will incorporate the foregoing substantive terms in an option and lease agreement, satisfactory in form to the parties, which fully describes the property and governing terms and conditions, and which will be filed with the Commission for approval when completed and executed.

3. Kansas City Southern.

The new consolidated company shall afford KCS the opportunity to quote on routing via KCS as an alternate to the other junctions on unit train, trainload, and multiple car movements of coal from BN origins in Montana and Wyoming to points presently served by KCS or which may in the future be served by KCS.

4. Southern.

The present traffic and operating relationships existing between BN and Southern, and between Frisco and Southern, and all other lines connecting with BN and Frisco, shall be continued by the new consolidated company. Such relationships include by way of example, not by way of limitation, cooperation in providing and maintaining present levels of run-through train service at Centralia, IL, pursuant to agreement between BN and Southern dated July 6, 1970, as amended, so long as warranted by traffic volume, and provided that Southern also maintains present levels of train service to and from Centralia. Such relationships also include trackage rights and other operating arrangements between BN and Southern and between Frisco and Southern. Southern consents to the new consolidated company succeeding Frisco as tenant under any such arrangements.

Upon merger of BN and Frisco, the new consolidated company will acquire all rights and obligations now held by Frisco under any such arrangements or agreements.

5. Union Pacific.

360 I.C.C.

a. The present traffic and operating relationships existing between applicants, on the one hand, and all lines connecting with their tracks, on the other, shall be continued. Following consummation of the merger of Frisco into BN, the new consolidated company and UP will continue to provide existing run-through train service via Kansas City, MO, now provided jointly by Frisco and UP, at least to the current level of service, as long as the volume of traffic moving in such run-through trains warrants their operation.

In this regard, the new consolidated company and UP should use their best effort and cooperate with each other in order to maintain and improve the quality of their run-through train service via Kansas City, MO.

b. The new consolidated company shall establish and maintain routes, rates, and transit arrangements on grain and grain products via BN-Butte-Silver Bow, MT-UP between its points in Montana, North Dakota, and Minnesota, on the one hand, and UP points in Utah, Nevada, and California, on the other hand. Transit arrangements will be consistent with BN transit arrangements maintained to other west coast markets or to the same market via other routes. Rates on these newly established routes shall be no higher than those via any other routes in which the new consolidated company participates between the same points. With respect to these new rates via Butte-Silver Bow, the new consolidated company and UP will in good faith negotiate divisions of revenues.

c. Following merger, applicants shall concur in the publication of the following language in all relevant Western Trunk Line, Southwestern Lines, other rate bureau tariffs, and individual line tariffs in which they participate and shall not oppose the taking effect of the following tariff language, the purpose of which is to maintain the existing UP-Frisco traffic interchange at Kansas City, MO/KS:

Except as otherwise provided, rates and charges from or to UP points in Colorado and Wyoming moving via UP through Dale, WY, as authorized in this tariff (or in other tariffs covering routing provisions as authorized), will not apply when interchanged with the BN at Denver, CO, and having prior or subsequent movement via Kansas City, MO/KS on traffic moving from, to or via the former St. Louis-San Francisco Railway.

UP should implement this condition by sending the letter, or variations thereof, that appears as appendix A to its stipulation with BN to the chairman of the Western Trunk Line. The new consolidated company shall adopt all such tariffs and tariff amendments and take all other additional action necessary or appropriate to implement this condition.

d. It is understood by the new consolidated company and UP that traffic will be delivered to or received from UP at Grand Island, NE, consistent with the rate and route provisions as currently published in the various applicable tariffs listed in appendix B to the stipulation between UP and BN.

6. Railroad employees of the merged system and subsidiaries shall be entitled to the standard level of protection,[4] unless an agreement is entered prior to merger, in which case protection shall be at the negotiated level.

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[4] *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

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Nos. 80-1434, 80-1439, and 80-1632

In the
SUPREME COURT OF THE UNITED STATES
October Term 1980

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner in No. 80-1434,
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner in No. 80-1439,
PEOPLE OF THE STATE OF ILLINOIS, et al.,
Cross-Petitioners in No. 80-1632

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BURLINGTON NORTHERN INC.,
Respondents.

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 24, 1981

QUESTIONS PRESENTED[1]

1. Whether the Court of Appeals erred in affirming the Interstate Commerce Commission's determination that the merger of the Burlington Northern and St. Louis-San Francisco Railway Company, conditioned to require two years of DT&I protection for competing carriers, will have a beneficial effect on the adequacy of transportation to the public, is in the public interest and should be approved?

2. Whether the Court of Appeals erred in affirming the Interstate Commerce Commission's denial of special protective conditions for MKT?

3. Whether the Court of Appeals erred in affirming the Interstate Commerce Commission's determination that the interests of

[1]Pursuant to Rule 28.1 of the Rules of Practice of this Court, Respondent Burlington Northern Inc. states that the following is a listing of all of its subsidiaries (except wholly-owned subsidiaries) and affiliates, with percentage owned indicated: The Belt Railway Company of Chicago (7.69%); Burlington Northern Air Freight (Australian) (99.99%); Butte Pipe Line Company (10.00%); Camas Prairie Railroad Company (50.09%); Chicago Union Station Company (25.00%); The Colorado and Southern Railway Company (90.57%); Davenport, Rock Island and North Western Railway Company (50.00%); Delta Alaska Terminal Ltd. (66.67%); Denver Union Terminal Railway Company (16.67%); Fort Worth and Denver Railway Company (99.97%); Galveston Terminal Railway Company (50.00%); Great Midwest Corporation (49.35%); Houston Belt and Terminal Railway Company (12.50%); Illinois Terminal Railroad Company (18.18%); Iowa Transfer Railway Company (25.00%); Kansas City Terminal Railway Company (16.68%); Keokuk Union Depot Company (33.33%); The Lake Superior Terminal and Transfer Railway Company (66.67%); Longview Switching Company (33.33%); Minnesota Transfer Railway Company (33.33%); National Railroad Passenger Corporation (36.00%); New Mexico and Arizona Land Company (50.07%); Paducah and Illinois Railroad Company (33.33%); Portal Pipe Line Company (60.00%); Portland Terminal Railroad Company (40.00%); Pueblo Union Depot (25.00%); The Pullman Company (4.13%); The St. Paul Union Depot Company (40.20%); Terminal Railroad Association of St. Louis (12.50%); Trailer Train Company (9.76%); Western Fruit Express Company (97.14%); Winona Bridge Railway Company (66.67%); and Wichita Union Terminal Railway Company (33.33%).

affected employees would be appropriately protected by negotiated agreements for certain employees and *New York Dock* conditions for affected employees not covered by such negotiated agreements?

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Nos. 80-1434, 80-1439, and 80-1632

In the
SUPREME COURT OF THE UNITED STATES
October Term 1980

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner in No. 80-1434,
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner in No. 80-1439,
PEOPLE OF THE STATE OF ILLINOIS, et al.,
Cross-Petitioners in No. 80-1632

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BURLINGTON NORTHERN INC.,
Respondents.

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

By decision served on April 17, 1980, the Commission approved and authorized, pursuant to 49 U.S.C. §11344, the merger of Respondent Burlington Northern Inc. (BN) and the St. Louis-San Francisco Railway Company (Frisco). This decision was based on extensive evidence submitted at public hearings commencing May 16, 1978 and concluding June 28, 1979, in which fifteen rail carriers, numerous shippers, and various public agencies (including the United States Department of Justice) participated. In addition to approving the merger transaction, the Commission imposed standard traffic conditions (DT&I condi-

tions) for a period of two years after merger consummation for carriers participating in the proceeding in order to afford them sufficient time to adjust to the impact of the merger.

The Commission's decision was based upon a thorough and searching review of the record evidence and a specific determination that the merger will result in substantial benefits to the shipping public in the form of greatly improved transportation services:

> "Approval of this merger, as conditioned, will have a beneficial effect on the adequacy of transportation to the public. Not only will the services of the merged company be significantly improved, but other railroads will be able to continue providing essential services. The merged company will be able to provide new single-line service, reduced transit times, more efficient and frequent service, and improved car utilization." 360 I.C.C. at 935, A238.[2]

Moreover, the Commission made extensive findings on the shipper support which the merger had attracted; benefits to the railroad industry generally which the transaction would generate; operating efficiencies and savings which the merged company could realize; enhanced opportunities for innovative ratemaking by the new company; and the positive impact which the merger would have both on inter- and intra-modal competition. (*See* 360 I.C.C. at 935-944, A238-247). As the Commission recognized, no party questioned these extensive public benefits. Rather, "Protestants in fact have based their cases on the belief that a merged BN-Frisco system would realize the benefits claimed." (*Id.* at 943, A246).

Fifteen rail carriers intervened in the Commission proceedings seeking various types of protection from the effects of the merger. Following careful consideration of the extensive evidence presented with respect to the necessity for such protection, the Commission concluded that imposition of the standard or DT&I traffic protective conditions for a period of two years would afford affected carriers "sufficient time to adjust to the new competitive climate" (360 I.C.C. at 947, A260). Accordingly, it rejected the

[2]The appendix to MKT's petition (No. 80-1434) is cited herein as A ___, and the appendix to RLEA's petition (No. 80-1439) is cited herein as ___a.

requests of the six carriers, including Petitioner Missouri-Kansas-Texas Railroad Company (MKT or Katy), which continued to press for much more extensive protection (*Id.* at 953-957, A256-260).

Following the issuance of the Commission's decision approving the merger, Katy and the Railway Labor Executives' Association (RLEA) petitioned for review in the United States Court of Appeals for the Fifth Circuit (Nos. 80-1523 and 80-1563) and that Court stayed the Commission's order. The Court of Appeals set the case for expedited handling, and after receiving briefs and oral argument both on the merits of the petitions for review and BN-Frisco's motion to vacate the stay, it issued an order on Friday, November 21, 1980, granting the motion to vacate. BN and Frisco merged on the afternoon of November 21,[3] and that evening Katy obtained a temporary stay of the Fifth Circuit's action. On Monday, November 24, the Court of Appeals released its decision on the merits. On Wednesday, November 26, this Court (by an 8-0 vote, Justice Marshall not participating) vacated the temporary stay and denied MKT's application for a further stay pending filing of a petition for certiorari.

Of the original fifteen carriers participating in the proceedings before the Commission, only two—MKT and Soo Line Railroad Company (Soo)—sought judicial review of the Commission's decision, and only Katy has petitioned for certiorari. Thus, all but one of the carriers which originally intervened have implicitly concurred in the Commission's determination that merger consummation will not impair their continued ability to compete effectively with the merged company and to provide efficient transportation service. RLEA and certain Illinois interests[4] also sought review of the Commission's decision by the Court of Appeals, and these parties now seek additional review by this Court.

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[3]The merger has thus been consummated for more than five months, and the physical consolidation of BN and Frisco operations is complete. Moreover, the Frisco no longer exists as a corporate entity; it has no shareholders, officers or directors; and its assets and obligations have been taken over by BN.

[4]Cross-petitioners in 80-1632, referred to herein as the Illinois interests, are People of the State of Illinois, Illinois Commerce Commission, Patrick W. Simmons, and M. S. Stuckey.

STANDARDS FOR JUDICIAL REVIEW

The decision of the Court of Appeals correctly delineated the appropriate standards for review of the Commission's decision. (632 F.2d at 399-400, A26-28). Petitioners have not challenged the Court's articulation of those standards, choosing instead to dispute the manner in which the Court applied them to the Commission's decision. As is evident from a review of the Fifth Circuit's opinion, the Court correctly concluded that the Commission had observed the statutory limits that Congress has set for its discretion, that it had not acted arbitrarily or capriciously, and that its findings were supported by adequate analysis and substantial evidence. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88 (1944).

Moreover, contrary to the contrived arguments of Petitioners, the Court of Appeals' decision does not conflict with the decisions of any other Courts of Appeals, and the standards for this Court's granting review on certiorari have not been met. *See* Rule 17, *Supreme Court Rules—The 1980 Revisions,* BNA (1980) at 49.

ARGUMENT

I. THE COURT OF APPEALS EMPLOYED THE PROPER STATUTORY ANALYSIS IN AFFIRMING THE COMMISSION'S DECISION TO APPROVE THE MERGER.

Katy first argues that the Commission failed to discharge its statutory obligation, pursuant to 49 U.S.C. §11344(b), to consider the effect of the proposed transaction on the adequacy of transportation to the public, including the service provided by other rail carriers, and that the Court of Appeals thus erred in affirming the Commission's approval of the merger. (Katy Pet., pp. 19-23).

This contention simply ignores the Commission's response to the statutory requirements and the lower Court's review of that aspect of the Commission's decision. Both the Commission and the Court of Appeals recognized that merger approval required analysis of the impact on the adequacy of transportation services provided by all rail carriers. Thus, the Court's opinion commences with an explicit recitation of the factors set forth in 49 U.S.C.

§11344(b) which the Commission is "required to consider" in a merger proceeding, specifically noting that one of these factors is "the effect of the proposed transaction on the adequacy of transportation to the public." (632 F.2d at 395, A5-6). The Court found that the Commission had carefully evaluated the evidence concerning the many merger benefits which would accrue to the shipping public and the evidence offered by competing carriers concerning the claimed negative impact of the merger. (632 F.2d at 397-9, A17-20). The Court concluded that, based on its assessment of the relevant evidence and "having closely reviewed the positions of all the parties" in a manner consistent with the "criteria of merger approval contained in the relevant statutes," the Commission properly exercised its discretion to approve the merger (632 F.2d at 398, A20).

As the Court noted, the Commission reached its decision to approve this merger only after a full and careful evaluation of the merger's impact on rail service provided by other carriers as required by § 11344(b), and clearly treated this as a component of the public interest standard:

> "The Commission has determined that the public will benefit in overall service if competing carriers are less shielded from the need to face the challenge of strong merged carriers. Burlington Northern Inc.—Control and Merger, 360 I.C.C. at 950-2. In order to gain that overall benefit for the public, the Commission has decided that only 'essential services' should be protected. We find the new weighing of the public interest perfectly appropriate under § 11344(b)(1) and any of the other broad statutory standards." (632 F.2d at 403, A40).

Katy attempts to support its contrived argument that the Court of Appeals "made a basic error in its understanding of . . . the statutory prerequisites for merger approval" by reference to one sentence in the opinion which states "[n]one of the petitioners directly challenge the Commission's ultimate conclusion that the BN-Frisco merger is in the public interest." (Katy Pet., pp. 19-20). Katy conveniently overlooks the next sentence where the Court states that "the validity of that conclusion" [that the merger is in the public interest] is attacked indirectly by challenges to specific

findings by the Commission (632 F.2d at 399, A24), including the Commission's finding that "Katy can withstand these diversions without a loss of essential service." (632 F.2d at 408, A61).

It is clear, therefore, that Katy's contention that an improper statutory analysis was applied by the Commission and the Court of Appeals presents absolutely no issue for review by this Court.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COMMISSION'S RELIANCE ON AN "ESSENTIAL SERVICES" STANDARD IS ENTIRELY CONSISTENT WITH THE STATUTORY CRITERIA GOVERNING APPROVAL OF RAIL MERGERS.

Katy also challenges the decision below on the ground that the "essential services" standard employed by the Commission in reviewing the merger is inconsistent with the applicable statutory criteria governing approval of rail mergers. This argument was thoroughly considered and definitively rejected by the Court of Appeals, and does not warrant review by this Court.

Under the "essential services" standard, the Commission assesses the impact of a merger on rail carriers by determining whether it might impair their continued ability to render transportation services essential to the public. As the Court of Appeals recognized, this standard was adopted by the Commission early in 1978 after an extensive review of consolidations, including public hearings conducted by its Rail Services Planning Office (RSPO), after enactment of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") in 1976. *See* 632 F.2d at 400-401, A31-32. Katy's claim here, as before the Court below, that this approach was new and "shocking" in the BN-Frisco decision is simply unsupported by the facts. (Katy Pet., p. 32).

As the Court of Appeals correctly found, the essential services standard, initially formulated by RSPO, represents "a new weighing of subsidiary factors within the public interest standard" (632 F.2d at 402, A36) which is fully proper under the statutory framework governing approval of rail consolidations. (632 F.2d at 402, A39-40).

Moreover, the Commission's determination to utilize an "essential services" analysis in assessing proposed rail consolidations

was based on its exercise of the expertise it uniquely possesses in such matters. This determination is precisely the type of "sensitive re-evaluation of the public interest" (632 F.2d at 403, A40) which is an integral part of the Commission's regulatory function. As this Court has recognized:

> "[T]he Commission, faced with new developments or in light of reconsideration of relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . This kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of the regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

Because Congress has bestowed a broad mandate upon the Commission in matters affecting transportation, this Court has consistently shown great deference to policy determinations of this nature made by the Commission in merger proceedings. As stated by this Court in the *Penn-Central Merger Cases*, 389 U.S. 486, 499 (1968):

> "[W]ith respect to the merits of the merger, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute."

See also, Ralston Purina Co. v. *Louisville & N. R. Co.*, 426 U.S. 476, 477-478 (1976); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-6 (1975). Katy's challenge to the Commission's policy determination should, therefore, be rejected.

Application of this essential services standard is not, as Katy argues, inconsistent with the Commission's mandate under 49 U.S.C. §11344 to consider the effect of a merger on the

"adequacy of transportation service." In assessing the impact of this merger, the Commission explicitly found, based on the extensive evidence submitted by all interested parties, including carriers such as Katy which claimed the merger might adversely affect them, that "[a]pproval of this merger, as conditioned, will have a *beneficial* effect on the adequacy of transportation to the public." (360 I.C.C. at 931, 935-941; A234; 238-244; emphasis added).[5]

Katy next contends that the "essential services" standard conflicts with the National Transportation policy "to encourage sound economic conditions in transportation, including sound economic conditions among carriers." 49 U.S.C. § 10101. Katy argues that by its reliance upon an "essential services" standard, "the Commission now welcomes the bankruptcy" of carriers, such as Katy, which may lose traffic as a result of a rail merger. (Katy Pet., p. 32). Nothing in the Commission's decision supports Katy's exaggerated suggestion. The decision simply articulates the Commission's judgment that the public interest will best be served by focusing on preservation of service, rather than preservation of corporate entities which do not provide needed transportation services. The Commission's decision makes it clear that where a merger threatens to jeopardize the ability of any carrier, weak or strong, to provide essential services, appropriate protective conditions will be afforded. As the Court found, this standard for approval of merger is fully consistent with the broad objectives of the National Transportation Policy set forth in 49 U.S.C. § 10101. (632 F.2d at 403, A40).

Katy's argument that the Commission's decision ignores the need for "sound economic conditions" among railroads adversely affected by the merger overlooks the Commission's overall finding that the merger will not impair any railroad's ability to continue to provide essential rail services (360 I.C.C. at 935, A238) and its specific finding that Katy's future prospects are "bright" and

[5]Katy's related contention that the Commission adhered to a "double standard" in approving the merger is equally untenable. By applying the "essential services" standard consistently throughout its opinion, as the Court found (632 F.2d at 401, A33-34), and thereby focusing on the quality of service rather than on which corporate entity provides it, the Commission clearly adhered to a standard designed to emphasize the adequacy of transportation to the public.

sufficient to protect it against losses in traffic revenues which may result from the merger. (360 I.C.C. at 954-955, A257-258). These findings also destroy Katy's contention that the "adequacy" of Katy's service after merger was ignored. (Katy Pet., p. 33). As stated, the Commission found that consummation of the merger would have a beneficial overall effect on the adequacy of transportation services provided to the shipping public. This finding, based on the Commission's exhaustive analysis of the evidence, completely satisfies the Commission's obligation to consider the impact of a rail merger on the adequacy of transportation to the public.[6]

III. THE COURT OF APPEALS PROPERLY SUSTAINED THE COMMISSION'S DETERMINATION THAT MKT IS FULLY CAPABLE OF WITHSTANDING THE IMPACT OF THE MERGER.

Based on its review of the evidence, the Commission determined that Katy is fully capable of withstanding a projected loss of $8.75 million in gross revenues and $4.5 million in net revenues (360 I.C.C. at 954, A257). The Court of Appeals affirmed this finding, stating that "a review of the record shows that the Commission cited very reliable evidence as the basis of its projection that Katy can withstand these diversions without a loss of essen-

[6]The Illinois interests also challenge the essential services standard, contending that the Commission erroneously lifted "the more lenient 'essential services' standard from section 5(3) [49 U.S.C. §11346] and made it applicable to section 5(2) [49 U.S.C. §11344] proceedings." (Pet., p. 8). In the first place, the essential services standard was *not* taken from either §11346 or §11344, but, as noted above, was the product of the Commission's own extensive study of rail consolidations conducted through its RSPO. Moreover, the Commission has determined that the public interest standard for merger approval is the same for applications processed under either §11344 or §11346. Railroad Consolidation Procedures, 359 I.C.C. at 199 (1980). Thus, as the Court found, the Commission's decision to apply an essential services standard as a component of the public interest standard was perfectly proper under either §11344 or §11346 (A35-37).

The Illinois interests' further argument (Pet., pp. 10-11) that the Commission should have made findings on the cumulative impact of this merger on other possible rail consolidations ignores both the settled law that such specific findings concerning projections of future events are not required, *FCC* v. *National Citizens Committee*, 436 U.S. 775, 814 (1978), as well as the practical fact that any such requirement would directly contravene the Congressional intent expressed in the 4-R Act to expedite rail merger proceedings (S. Rep. No. 94-499, 94th Cong., 2d Sess. (1975), pp. 13, 18). *See* 632 F.2d at 410, A72-73.

tial service." (632 F.2d at 408, A61). On petition to this Court Katy recites again the same arguments concerning these findings which have now been raised and rejected before both the Commission and the Court of Appeals.

We emphasize at the outset that where, as here, the Court of Appeals has found the agency's findings to be supported by substantial evidence, further review by this Court is unwarranted:

> "Our power to review the correctness of application of the present ["substantial evidence"] standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeal. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-1 (1951).

In any event, it is clear that the Commission's findings in this respect are abundantly supported by the evidence.

Although Katy criticizes the Commission's findings as to its future prospects, it cites no evidence to support its contention that it will be unable to withstand the merger's impact. The reason for this glaring omission is that Katy failed to present any such evidence to the Commission. The only evidence submitted by Katy concerning the potential post-merger impact consisted of three-year financial projections which were based on the assumption (admitted by Katy to be erroneous) that the merger would be consummated in 1978, an assumption which totally undermined the validity of Katy's entire post-merger analysis. (Exhibit H-160, Nos. Z-7 and Z-8). The financial projections submitted by Katy, which treat 1979, 1980 and 1981 as three post-merger years, thus did not afford the Commission any evidence of the impact of the merger on Katy's post-merger operations.

Despite the fundamental deficiencies in its own presentation regarding post-merger impact, Katy challenges the Commission's findings with respect to three post-merger developments which the Commission found would enable Katy to fully withstand the

impact of the merger. Although Katy criticizes the basis for these findings, it concedes in its petition that they were taken largely from the testimony of its own witnesses and its exhibits. (Katy Pet., p. 36).

Katy first criticizes the Commission's finding that anticipated coal movements will contribute to its post-merger viability. (Katy Pet., pp. 37-39). As the Court of Appeals noted, however, the evidence on this point was abundant and, in fact, would have alone been sufficient to support the Commission's view that Katy can withstand the impact of the merger:

> "... the Commission found that Katy can expect strong growth in revenues because of coal transportation for several new electric generating plants. Three of these units were completed as of the time of the Commission's opinion, and Katy itself projected $26 million annually in new revenues from these plants alone. Five additional units were and are projected, each generating $10 million in additional gross revenues for Katy. These findings alone would support the Commission's view that Katy can withstand the merger, because the maximum gross revenue loss for Katy due to the merger is projected to be about $9 million. 360 I.C.C. at 1091." (632 F.2d at 408, A61-62).

Moreover, the evidence concerning these vast new coal movements in post-merger years beyond 1981 consisted of financial projections and testimony of Katy's own witnesses, including the testimony of Katy's president (Tr. 5929-5931; Exhibit H-149, p. 11; Tr. 6534-36). Katy also assured its stockholders that these coal movements "should provide very substantial new business in future years." (MKT Annual Report 1977, pp. 3-4).[7]

Katy also challenges the validity of the Commission's findings concerning the favorable impact on its net revenue prospects re-

[7]The significance of this future coal traffic is conclusively established by Katy's indemnity proposal. Katy proposed that the indemnification to be paid exclude any new coal traffic delivered by the merged company to MKT for the LCRA and GRDA plants. On Brief to the Commission, Katy stated that "[i]f such traffic were not excluded from the post-merger interchange revenues referred to in MKT's proposed formula, the effect of its inclusion would be to eliminate the need to pay indemnity, even if all traffic estimated by MKT to be diverted were diverted." (MKT Br., pp. 34-35, fn. 21)

sulting from the completion of its massive rehabilitation program. Regarding that claim, the Court of Appeals properly noted that "the testimony of Katy's own witnesses largely supported the Commission's evaluation of the program" and therefore "Katy cannot argue with the Commission's choice to believe them." (632 F.2d at 408, A62). Moreover, Katy's contention that the Commission should have been more precise as to the exact time the rehabilitation program will be completed is absurd in light of the fact that Katy's own evidence offered on this issue was equally general in character. Thus Katy's own executives testified in terms of completing the rehabilitation "within the next three years." (Exhibit H-149, p. 3; Tr. 5921). Further, Katy's witnesses referred to rehabilitation of the entire railroad (Tr. 5921) and there is no evidence to support MKT's present suggestion (Katy Pet., p. 40) that the program addresses less than all of MKT's current rehabilitation needs, including the St. Louis line.

Katy next contends that the Commission's findings as to the benefits from its tax agreement with its parent are erroneous. Again, the Court's discussion convincingly disposes of this argument:

> ". . . the Commission recognized that Katy had concluded an agreement with its parent company to be reimbursed for any Katy tax losses that could be utilized by the parent company. The agreement is an undisputed fact, and demonstrably provides Katy with a significant 'cushion' against losses. It was not an improper consideration in evaluating Katy's overall financial stability." (632 F.2d at 408, A63).

Moreover, the Commission did not itself calculate the financial benefits of the agreement but, again, implicitly relied on Katy's own evidence of such benefits for the years 1978-81 (Exhibits H-160, H-166). These specific dollar amounts clearly support the Commission's finding that the agreement provides significant financial benefits for Katy. Any technical inaccuracy in the Commission's description of the agreement is thus of no significance.

Katy also objects generally to these findings on the grounds that the Commission has not reduced each of these post-merger prospects to a finite mathematical projection. It is settled, however, that an agency is not required to engage in the futile task of making finite mathematical findings concerning future projec-

tions, particularly where, as here, the agency has employed its expert judgment concerning three uncontested post-merger prospects each of which will have a substantial undisputed favorable impact on Katy's future. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *United States* v. *ICC*, 396 U.S. 491, 516 (1970); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28-29 (1961).

The Commission's findings that Katy can withstand the impact of the merger are thus abundantly supported by evidence of record and present no basis for review by this Court.

IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COMMISSION'S FINDINGS AS TO MKT'S PROJECTED MERGER REVENUE LOSSES WERE AMPLY SUPPORTED BY EVIDENCE OF RECORD.

MKT's contention that the Fifth Circuit erred in affirming the Commission's findings with respect to Katy's projected merger revenue losses (Pet. pp. 46-53) is completely without merit. In response to Katy's identical contention below, the Court carefully analyzed the Commission's detailed examination of the evidence submitted both by BN-Frisco and by MKT itself as to projected revenue losses due to diversions of traffic from Katy to the merged company (*see* 360 I.C.C. at 1069-1073, A372-376 and 1083-1091, A386-394) and concluded that the Commission's findings—that Katy might suffer a *maximum* gross revenue loss of $8.9 million and a *maximum* net revenue loss of $4.5 million[8]—were amply supported by record evidence. (632 F.2d at 404-407, A44-58).

The predicate for Katy's argument that there was no substantial evidence to support the Commission's diversion findings is simply that the Commission determined that it would impose the so-called "DT&I conditions" (which prohibit the merged company from closing gateways and cancelling joint rates and routes with other carriers) for a period of two years. Since the BN-Frisco studies of projected diversions assumed that 100 percent of such

[8]The likelihood that Katy and other carriers would be forced to respond to the competitive challenge of the merged company with initiatives of their own (and thereby minimize the scope of projected diversion losses) was recognized by the Commission to be a positive factor weighing in support of the merger's approval. *See* 360 I.C.C. at 943-944, A246-247.

diversions would not be realized for three years following consummation of the merger and that DT&I conditions would be in effect for those years, MKT protests that there is no way to know whether greater diversions of its traffic might occur after the DT&I conditions have been lifted. As the Court correctly noted, however, the Commission's finding that 95 percent of all diversions which would occur because of the benefits "inherent in the merger itself"[9] would take place by the second year after merger (632 F.2d at 405, A49) made its diversion estimates 95 percent complete and reliable for the first two full years following merger.[10] *(Id.* at 407, A57).

Accordingly, MKT does not and cannot dispute the fact that the Commission made a soundly reasoned projection (indeed, an intricately reasoned projection, *see* 360 I.C.C. at 1083-1091, A386-394) of the maximum losses which Katy might experience during the first two years of the merged company's operations. Since it is well-settled that the Commission is not required to make traffic diversion projections with mathematical precision[11] and in view of the fact that the Commission itself acknowledged in detail the limitations of such projections which ". . . have as their purpose the quantitative measurement of the expected *general, short-term changes* in the relative competitive strength of a merged rail system in relation to competing carriers" (360 I.C.C. at 1068-69, A371-372, emphasis added), the Commission's obligation to consider the revenue impact of the merger on other railroads was properly discharged. Indeed, as the Fifth Circuit recognized, the Commission was free to exercise its expert judgment with respect to the relevant period of time for evaluating the merger's impact on the public interest, and it was free to conclude that a two year analysis was adequate. (632 F.2d at 405, fn. 34; A52, fn. 34).

[9]These merger benefits—notably single-line service and the faster transit times and greater reliability associated therewith—were recognized by Katy itself as the most significant factors contributing to diversion of its traffic. 360 I.C.C. at 1084, A387.

[10]In the case of MKT, the estimate was 100 percent reliable since Katy's own evidence showed that it projected 100 percent of all diversions would occur by the end of the second year. See 360 I.C.C. at 1084, A387.

[11]*See, e.g., Chicago & N.W. Ry. Co.—Merger—Chicago G.W. Ry. Co.*, 333 I.C.C. 236, 238-239 and cases cited therein; *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 754, 759 (1968).

However, since a number of the Commission's other merger projections were made for a three year period, the Court felt compelled to consider MKT's argument that substantial evidence was both required for and absent from the analysis of adverse impact on other carriers. Respondent Burlington Northern does not believe that the Commission was required to make further findings as to impacts either in year three or in following years. However, to the extent that the possibility of any additional diversions following the lifting of the DT&I conditions is a proper subject of concern, the Fifth Circuit correctly concluded that *whether* additional diversions occur at all is totally within the control of the Commission and MKT. (632 F.2d at 406, A53). Specifically, the Commission's reserved jurisdiction under condition 1(j) of the decision (360 I.C.C. at 1180, A483) affords all parties to the proceedings, including Katy, an opportunity to seek an extension of the time in which DT&I conditions will apply to the transaction, should actual experience prove such relief necessary. This avenue of potential redress has been held by the courts to constitute an adequate safeguard against the possibility that the diversion losses actually experienced are greater than originally estimated.[12] *See Penn-Central Merger Cases,* 389 U.S. 486, 520 (1968); *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd per curiam,* 375 U.S. 216 (1963).

Moreover, as the Court noted, existing provisions of the Interstate Commerce Act, which the Commission has given notice it intends to vigorously enforce,[13] would prohibit the merged company from arbitrarily cancelling joint routes and rates with, or closing gateways to Katy once the DT&I conditions are lifted. Indeed, Section 11101 (requiring BN to honor fundamental com-

[12]The Commission has repeatedly emphasized the importance of this post-merger remedy:

> "Our reserved powers are adequate to deter improper traffic diversion, inequitable conduct on the part of the merged company, or if necessary, to provide additional protection in the future." *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 331 I.C.C. 754, 759-760 (1968) (emphasis added). *See also, Chicago & N.W. Ry. Co.—Merger—Chicago G.W. Ry. Co.,* 333 I.C.C. 236, 239 (1968).

[13]*Seaboard Coast Line R.R. Co.—Investigation of Control,* 360 I.C.C. 582, 603 (1979); *St. Louis Southwestern Ry. Co.—Purchase (Portion)—Chicago, Rock Island and Pacific R.R. Co.,*____I.C.C.____(1979); *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.,* 363 I.C.C. 518 (1980), *appeal pending* 7th Cir. No. 80-2534.

mon carrier obligations by providing service and establishing reasonable through routes and rates); Sections 10741 and 10742 (requiring BN to provide reasonable and equal interchange facilities with connecting carriers); and Section 10705(d) (preventing BN from cancelling existing joint rates and through routes unless it can establish that such cancellation is consistent with the public interest) afford MKT ample protection against additional significant diversions once the DT&I conditions have been lifted.[14]

In addition, the Court's proper acknowledgment that the Commission is entitled to use its expertise to independently analyze and, where appropriate, to supplement the parties' projections of future economic conditions (632 F.2d at 406, A55-56) should set to rest the contention that the Commission's assessment of Katy's ability to withstand the competitive rigors of the merger was not supported by substantial evidence. As discussed previously, the Commission considered in detail both Katy's problems and future opportunities and concluded that the carrier's "future prospects are sufficient to protect it." (360 I.C.C. at 955, A258). Since the Commission made that judgment with the knowledge that it was imposing DT&I conditions on the transaction for a period of only two years, it necessarily factored the possibility of additional diversion losses following the lifting of the conditions into its evaluation. As the Fifth Circuit correctly observed, this Court has often held that the Commission's "predictive judgments" are entitled to considerable deference, and "[t]o hold otherwise would

[14]Katy's claim that such protections are useless because they would require it to pursue its remedies with the Commission (Pet., p. 52, fn. 15) warrants little credence. Not only has Katy vastly overstated the scope of what it would have to do to pursue such cases (since a relatively few of the "thousands of routes" it refers to account for a large portion of its total traffic with BN and since BN would have the burden of proving the public interest benefits of any cancellations), but it has revealed its true concern that it might not fare well in justifying the maintenance of any joint routes or rates for which cancellation could be sought. MKT's reservations on this score lend support to the Commission's concern that it not impose conditions ". . . calculated to freeze the flow of traffic into a preexisting pattern or to protect competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporation. Such action would prevent, to a substantial extent, the effectuation of service improvements to which the shipping public is entitled, and would unduly restrict the unified company in its solicitation and routing of traffic under development of a strong competitive system." (360 I.C.C. at 951, A254, footnotes omitted).

paralyze agencies merely because the future is not subject to proof." (632 F.2d at 406, A56).

Finally, BN notes that the Fourth Circuit recently dealt with the issue of the DT&I conditions in *Norfolk and Western Railway Company* v. *United States,* decided on February 17, 1981 (4 Cir. No. 79-1862), a case which no Petitioner has cited. There the Fourth Circuit affirmed a Commission decision with respect to control of the very railroad for which the conditions are named—the Detroit, Toledo and Ironton (or DT&I)—but remanded the case on the grounds that the Commission had altered its policies on the conditions in that proceeding without giving proper notice to the parties. There are, however, fundamental dissimilarities between the Commission's decisions in *BN-Frisco* and *Norfolk and Western* which make the actions of the reviewing courts entirely distinguishable.

First, rather than imposing DT&I conditions for the benefit of protesting railroads for a two year period as it did in *BN-Frisco,* the Commission in *Norfolk and Western* refused to impose DT&I conditions *for any period at all.*[15] Moreover, the Commission's decision in *Norfolk and Western* did not contain the reasoned analysis of the anticompetitive and chilling effects of conditions which appears in *BN-Frisco* (see 360 I.C.C. at 950-952, A253-255), and which the Fifth Circuit held to constitute adequate support for ". . . the Commission's larger policy decision restricting the use of protective conditions . . ." (632 F.2d at 409, A69). Thus the Fourth Circuit was faced with a decision which was essentially devoid of the requisite articulation of the reasons supporting a change in Commission policy. The Fifth Circuit on the other hand, found the required articulation in *BN-Frisco* and correctly noted that this Court has approved policy changes in such circumstances. *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267 (1974); *Atchison, T. & S.F. Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973); *American Trucking Assns, Inc.* v. *Atchison, T. & S.F. Ry. Co.,* 387 U.S. 397 (1967).

[15]The significance of the Commission's application of the conditions for a two year period in *BN-Frisco* is that MKT will have a sufficient opportunity during this time to adjust to the merger's impact by implementing competitive initiatives of its own and, if necessary, to petition the Commission for additional relief. The Commission's decision in *Norfolk and Western* afforded adversely impacted carriers no similar protection for a transition period within which the impacts of the merger could be analyzed and appropriate responses developed.

Second, Katy did not pursue the issue of the propriety of the Commission's decision to limit DT&I conditions before the Fifth Circuit, and it has not raised the issue in its Petition for Certiorari. In fact Katy took extreme care to advise the Court below that it was specifically *not* raising that issue for consideration but was rather contending that the limitation resulted in an undermining of substantial evidence needed to support Commission findings as to MKT's future prospects:

> "Katy does not regard this appeal as the proper forum for determining the desirability of retention or elimination of the DT&I conditions *and has not herein asserted the decision to limit them as independent error.*" Reply Brief of Missouri-Kansas-Texas Railroad Company before the Fifth Circuit, dated July 29, 1980, at p. 20 (emphasis added).

Similarly, Katy in its Petition for Certiorari again limited its argument to the substantial evidence point, contending that "Whatever the merits of the Commission's decision to limit the time period of the DT&I conditions as a matter of policy, the evidence herein is inadequate to support the finding that the maximum loss to Katy will be only $8.75 million a year . . ." (Pet. p. 48). Accordingly, the issue decided by the Fourth Circuit was explicitly disavowed by Katy as an issue for review both before the court below and before this Court.[16]

It has long been a well-settled point that, in the words of Justice Black, "Ordinarily an appellate court does not give consideration to issues not raised below."[17] *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941). *See also, American Air Export & Import Co.* v. *O'Neill,* 221 F.2d 829 (D.C. Cir. 1955); *United States* v. *Wurtsbraugh,* 140 F.2d 534 (5th Cir. 1944). Of necessity the rule must apply even more forcefully in cases where a party like Katy has

[16]Moreover, to the extent that there might be any need for further resolution of the policy issue of the treatment of DT&I conditions, the most appropriate forum in which to frame that resolution is the Commission's pending rulemaking proceeding in *Ex Parte No. 282 (Sub-No. 5),* 45 F.R. 46461 (July 10, 1980). MKT is a party to that rulemaking proceeding.

[17]Although courts have recognized an exception to the rule, they have confined the exception to instances where ignoring a new argument would work a grave injustice—notably in criminal cases. *See Anderson* v. *United States,* 417 U.S. 211, 217, fn. 5 (1974). Such an exception can hardly be deemed appropriate where, as here, a party has taken pains to articulate actual disavowal of the point before the court below.

taken affirmative steps to advise the reviewing court that it knowingly disavows a particular claim as grounds for error.

V. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE COMMISSION'S DECISION TO DENY MKT SPECIAL PROTECTIVE CONDITIONS DID NOT VIOLATE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS.

Katy argues that although the Commission has granted indemnification previously, its decision not to do so in this case, accompanied by the dual warning that such relief will no longer be viewed "as a viable condition under any circumstances" (360 I.C.C. at 953, A256) and that the Commission will not impose conditions not sought by a protesting carrier (*Id.* at 951, A254), constitutes a denial of procedural due process. (Pet., pp. 54-65)

As the Fifth Circuit found, Katy's argument is academic because of the overriding consideration that these policies had no actual impact on Katy in this case:

> "There is no indication in the opinion itself that the Commission reached any decision through applying the new policies to Katy. The Commission consistently states that Katy failed to establish the need for any protective condition at all, *a decision on the merits that does not involve either policy.*" (632 F.2d at 410, A70-71, emphasis added).

MKT's suggestion that this fundamental finding "was made only in the context of the Commission's denial of [indemnification] relief" (Pet., p. 59) is absolutely erroneous. After reviewing the evidence of Katy's future prospects (which it termed "bright", 360 I.C.C. at 954, A257), the Commission found that *those prospects* "are sufficient to protect it."[18] Obviously, once the Commission had concluded that Katy's future business and potential were sufficient to protect it, there was no reason to consider protective conditions for its benefit.[19]

Katy's suggestion that because the Commission imposed certain trackage rights conditions on behalf of the Chicago and

[18] Following an extensive review of Katy's business history and prospects (360 I.C.C. at 1118-1122, A421-425), the Commission concluded that "Even with consummation of the merger MKT should produce a profit in 1981." (*Id.* at 1122, A425).

[19] It should be noted, however, that despite its announced "unrequested conditions" policy, the Commission was aware of, and explicitly acknowledged that "[its] statutory authority to impose such conditions is not limited to conditions proposed or favored by the carriers." (360 I.C.C. at 933). *See also, Illinois Central Gulf R. Co.—Acquisition—G.M.&O. et al.*, 338 I.C.C. 805, 844 (1971).

Northwestern Railroad Company (CNW) it "might well have granted such relief" to MKT (Pet., p. 59) is both speculative and misleading. As Katy knows full well, CNW and eight other carriers entered into stipulation agreements with the merger applicants for certain conditions in return for those parties' not opposing the transaction. *See* 360 I.C.C. at 1152-1156, A455-459. In recognition of the fact that these stipulated conditions were "operationally feasible, [would] not detract from the benefits of the merger, and are in the public interest" (360 I.C.C. at 957, A260) (and that they represented voluntary settlements by the parties), the Commission imposed them on the transaction. Contrary to the suggestion by MKT (Pet., p. 60, fn. 19), *all* stipulated conditions save one—which was opposed by another carrier and found by the Commission to be inimicable to the public interest (360 I.C.C. at 957, A260)—were imposed. Katy never proposed any similar conditions and indeed advised the Commission during the presentation of its case that it was not interested in trackage rights and that indemnity was the only acceptable condition. (Exhibit H-160, pp. 27-28).

Equally unconvincing is Katy's attempt to dispute the Fifth Circuit's unequivocal conclusion that Petitioner's claimed reliance on being accorded an indemnification condition was "grossly misplaced" (632 F.2d at 410, A71). As the Court accurately observed, the Commission has imposed indemnification as a condition only twice in its history and then, as the Commission itself noted (360 I.C.C. at 952, A255), only as a short-term or interim measure "while a more permanent solution" was being fashioned. *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304 at 326-327 (1966); *Chicago & Northwestern Ry. Co.—Control—Chicago, Rock Island and Pacific R.R. Co.*, 347 I.C.C. 556 (1974). Moreover, even in those two cases (neither of which resulted in the Commission's actually administering an indemnity condition), the basis for imposing the relief was the Commission's finding that the merger under review threatened the continued existence of carriers whose preservation was deemed essential to the public interest.[20] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 at 529, 532 (1966); *Chicago & Northwestern Ry. Co., supra* at 616,

[20]Katy's statement that "no case at all denying indemnity is cited by the Court of Appeals" (Pet., p. 61) is disingenuous. As MKT is aware, the Commission has

(Footnote continued on next page.)

627, 630-31. As discussed previously, the Commission here made specific findings both that Katy's continued existence was not threatened and that essential services provided by Petitioner would not be lost.

Finally, Katy simply cannot escape the fact that the policy changes of which it complains were found by the Court of Appeals to have been adequately explained by the Commission in the *BN-Frisco* decision. (632 F.2d at 408-409, A66-70). Moreover, as the Court indicated, "An agency may change its policies in the course of a specific adjudication, *American Trucking,* 387 U.S. at 416, 87 S.Ct. at 1618, and even apply those policies for the first time to the parties involved, *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 292-294 (1974); *SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947)."[21] (632 F.2d at 409, A66). *Accord, Pre-Fab Transit Co.* v. *United States,* 595 F.2d 384 (7th Cir. 1979); *Sawyer Transport, Inc.* v. *United States,* 565 F.2d 474 (7th Cir. 1977); *Pittsburgh and Lake Erie R. Co.* v. *United States,* 294 F.Supp. 86, 95 (W.D. Penn. 1968). As the Fifth Circuit's decision and these additional citations make clear, there is simply no merit to Katy's claim of a conflict of Circuits on this point.

VI. THE PETITION FOR WRIT OF CERTIORARI FILED BY RAILWAY LABOR EXECUTIVES' ASSOCIATION DOES NOT RAISE ANY ISSUE WARRANTING REVIEW BY THIS COURT.

A. The Court of Appeals Properly Affirmed The Commission's Order Concerning The Scope of Employee Protection Afforded by 49 U.S.C. §11347; Moreover, The *Soo Line* Decision Presents No Conflict With the Decision of the Court Below.

Railway Labor Executives' Association ("RLEA") first contends that the Commission's determination, fully accepted by the

(Footnote continued from previous page.)
rejected indemnity conditions in a number of cases, and Respondents cited such cases to the Court. *See, e.g., MoPac—Merger—T&P and C&EI,* 348 I.C.C. 414, 424 (1976); *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 331 I.C.C. 643, 736-737 (1967).

[21]The Supreme Court's ruling in *American Trucking Associations* v. *Atchison T. & S.F. Ry. Co.,* 387 U.S. 397, 416 (1967), is particularly on point in view of the Commission's reasoned analysis of the changes in the railroad industry and the regulatory climate which led it to change its policy with respect to indemnification (see 360 ICC at 952-53, A255-256).

Court of Appeals, that employees of non-applicant competing carriers are not within the class of employees protected by 49 U.S.C. §11347 of the Interstate Commerce Act, is erroneous and, in light of the allegedly conflicting decision in *Soo Line R. Co.* v. *United States,* 280 F. Supp. 907 (D. Minn. 1968), warrants review by this Court. This argument is totally without merit.

As the Court of Appeals properly reasoned, a plain reading of the statutory provision involved (49 U.S.C. §11347) refutes RLEA's assertion that protection must be extended to employees of competing carriers:

> "The Commission first noted that, although the first sentence of §11347 seems to require protection for any carrier employee affected by the merger, the second sentence provides, in an undifferentiated transition, that 'the arrangement may be made by the rail carrier and the authorized representative of its employees.' It is difficult to imagine that when Congress wrote this sentence it was contemplating that a non-merging carrier would agree to protect its own employees from the merger of two competing carriers. Because the second sentence obviously applies only to the merging carrier, the Commission reasons that Congress intended the same meaning in the preceding sentence." (37a-38a).

Similarly, a three-judge court in *Florida East Coast Railway Company* v. *United States,* 259 F. Supp. 993, 1019 (M.D. Fla. 1966) *affirmed per curiam,* 386 U.S. 545 (1967), agreed that this construction is "the logical interpretation of the statute."

This statutory interpretation is reinforced by the legislative history of the provision. Section 11347 was first enacted as Section 5(2)(f) of the Transportation Act of 1940. The basis of Section 5(2)(f) was the Washington Job Protection Agreement of 1936 ("WJPA"). *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169, 173-4 (1961); *United States* v. *Lowden,* 308 U.S. 225, 237-38 (1939).[22] The term "employees affect-

[22]See also *New York Dock Ry.* v. *United States,* 609 F.2d 83, 86 (2d Cir. 1979); testimony of George M. Harrison before the House Committee on Interstate and Foreign Commerce, H.R. 2531, 76th Congress, 1st Sess. (1939), pp. 213, 216-17, 241 and 243; and before the Senate Committee on Interstate Commerce, S. 1310, 2016, 1869, and 2009, 76th Cong., 1st Sess. (1939), p. 34.

ed" was taken directly from the WJPA which limited its job protection to employees of the merging carriers.[23]

Further, the Commission and the courts have consistently and overwhelmingly held that this provision does not apply to employees of competing carriers, despite repeated unsuccessful efforts by labor interests to secure a contrary statutory interpretation.[24] Moreover, Congress explicitly sanctioned this settled Commission interpretation in its enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). This is most apparent from the amendment to §5(2)(f) in the 4-R Act (since recodified as Section 11347) which established the past practices of the Commission concerning employee protection as one of two governing standards. Thus, §5(2)(f), as amended, required the Commission to provide employee protection "no less protective of the interest of employees than those heretofore imposed pursuant to this subdivision" and those established pursuant to Section 565 of Title 45. The governing inquiries with respect to the scope of the present labor protective provisions thus involve the Commission's customary practices in cases prior to the 4-R Act and the provisions of Appendix C-1 (which were established under Section 565 of Title 45).

With respect to the first inquiry, there simply is no basis for dispute. As noted above, the Commission has *uniformly* rejected the argument that it is required to protect employees of competing

[23]See, *e.g.*, section 4 of the WJPA cited by the Commission, 360 I.C.C. 949 n.81 which provides:

> "*Each carrier contemplating a coordination* shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient *to the interested employees of each such carrier* and by sending registered mail notice to the representative of such interested employees." (emphasis supplied)

[24]*Baltimore & Ohio Railroad Co. Operation*, 261 I.C.C. 615, 619-620 (1946); *Southern Railway Co.—Control—Central of Georgia Railway Co.*, 317 I.C.C. 557, 567-8 (1962) *aff'd, Railway Labor Executives' Association* v. *United States*, 226 F. Supp. 521 (E.D. Va. 1964); *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261 (1962); *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 203-204 (1963), *aff'd, Florida East Coast Ry.* v. *United States*, 259 F. Supp. 933, 1019 (M.D. Fla. 1966), *aff'd per curiam*, 386 U.S. 545 (1967); *Texas & Pacific Ry.—Control—Kansas O. & G. Ry.*, 321 I.C.C. 309, 339 (1964); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304, 343-344 (1968); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967); *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd. sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir., 1979).

carriers and has consistently limited employee protection to affected employees of the merging carriers. It is equally clear that the provisions of Appendix C-1 are properly reflected in the conditions imposed in this case and do not require protection for employees of competing carriers.[25]

In the *New York Dock* proceedings, the Commission, after careful consideration of Appendix C-1 and prior administration of §5(2)(f), formulated the conditions which it imposed in this case (360 I.C.C. 60, Appendix III). RLEA participated in the *New York Dock* proceedings before the Commission and submitted a proposed set of conditions which provided exactly the same protection for employees of competing railroads of RLEA sought in the present proceedings. (Article V of Appendix I, 360 I.C.C. 60; Exhibit H-58 herein). The Commission rejected the tendered provision. On review, the Court of Appeals for the Second Circuit (with RLEA participating) held that the labor protection conditions formulated by the Commission complied with the mandate of §5(2)(f), as amended (now Section 11347), taking into account both the past practices of the Commission in prescribing employee protection and the provisions of Appendix C-1.

As both the Commission and the Court of Appeals noted, the express Congressional approval of past Commission administration of §5(2)(f) in the 1976 legislation completely forecloses the attempt by RLEA to secure a novel interpretation of that section in this case. (360 I.C.C. at 949, 167a; 632 F.2d at 412, 39a).

[25]It is difficult to believe that RLEA seriously relies on the contention, advanced for the first time in its petition, that the reference in the Rail Passenger Service Act (RPSA) to employees of terminal companies indicates that "Congress has in effect mandated that employees of non-applicant carriers be protected". (Pet., p. 13) The protective conditions established pursuant to this statute (Appendix C-1) provide protection for those employees of terminal companies which are owned in whole or in part by one of the applicants and which have a relationship to the applicants similar to that of the terminal company involved in *Railway Labor Executives' Association* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963). Protection for employees of such associated companies has been imposed by the Commission in the past on the basis that they "were in reality, though not in contract" the employees of the applicants (216 F. Supp. 101 at 103). In fact, the *New York Dock* conditions which the Commission imposed in this case include an identical provision (Article III of Appendix III, 360 ICC 60 (1979)) relating to terminal companies. The provisions established pursuant to 45 USC § 565 thus refute RLEA's claim that the Commission was required to extend protection to employees of the numerous competing carriers involved in these proceedings.

NLRB v. *Bell Aerospace,* 416 U.S. 267, 274-275 (1974). This conclusion is also supported by the fact that Congress again had occasion to review this provision in its amendments and recodification of the Interstate Commerce Act in 1978. Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337. Although the language of that section was changed in certain respects, the provision affirming the Commission's past practice was left intact.[26] As the Court of Appeals properly decided, "this double affirmation by Congress, in the absence of any other support for the RLEA position, puts the question to rest." (632 F.2d at 412, 39a).

RLEA relies on two judicial decisions to support its construction of the statute. *Railway Labor Executives' Assoc.* v. *United States,* 216 F. Supp. 101 (E.D. Va. 1963) and *Soo Line R. Co.* v. *United States,* 280 F. Supp. 907 (D. Minn. 1968). (RLEA Pet., p. 7). Its reliance on the first case is entirely misplaced, for there the court specifically found that the employees to be afforded protection were in effect employees of the merging carriers.[27] This decision, therefore, clearly cannot be read as supporting RLEA's position that to employees of competing carriers must be protected.

Moreover, the following year in a case brought before the same court by RLEA (and involving two of the same three judges), the court unambiguously rejected RLEA's far broader construction of the statute urged on petition to this Court. *Railway Labor Executives' Association* v. *United States,* 226 F.Supp. 521, 525 (E.D. Va. 1964). In a subsequent decision, the Commission likewise explicitly rejected RLEA's interpretation of that earlier decision, again affirming its settled position that §5(2)(f), now

[26]RLEA argues that this 1978 Congressional recodification of the provision is not significant because the "recodification may not be construed as making a substantive change in the laws replaced." (Pet., p. 14-15) BN, however, is not contending that the 1978 recodification to §5(2)(f) effected any substantive change, but instead is making precisely the opposite point—that Congress again impliedly approved, as it did in 1976, the Commission's past administration of the statute respecting employee protection. *See, e.g., Bell Aerospace, supra.*

[27]There protection was granted to employees on the payroll of the Chesapeake & Ohio, who actually performed work for the merger applicant, Seaboard, at a jointly-owned terminal facility. The court found that because of their immediate relationship to Seaboard "they were in reality, though not in contract, as much the employees of Seaboard as of Chesapeake," and hence entitled to statutory protection. 216 F. Supp. at 103.

§11347, was not intended to apply to employees of competing roads. *Pennsylvania R. Co.—Merger—New York Central R. Co.* 328 I.C.C. 304, 313-14 (1966).

RLEA's reliance on the one aberrant decision in *Soo Line* is also misplaced. In *Soo Line,* the court held that employees of competing carriers, if adversely affected by a merger transaction, are within the scope of §5(2)(f) protection. The Commission had rejected such a construction below based on its long-standing statutory interpretation and compelling policy reasons. *Chicago & N.W. Ry. Co.—Merger,* 330 I.C.C. 13, 54 (1967).

As the Court of Appeals noted, *Soo Line* predates and is inconsistent with the governing standard approved by Congress in amending §5(2)(f) in the 4-R Act. (39a). This standard clearly excludes from the minimum requirements of the statute (§5(2)(f)) protection for employees of competing carriers because the Commission has not imposed such protection in its prior administration of the Act. Moreover, on remand of the *Soo Line* decision, the Commission again disagreed with the holding of the court, and, in fact, did not impose protective conditions for employees of the Soo Line Railroad. 333 I.C.C. at 252-3. The Commission's response to the *Soo Line* decision thus preserves intact its history of refusal to accord protection to employees of competing carriers, and this approach was approved by Congress when §5(2)(f) was amended by the 4-R Act.

The decision of the Court of Appeals below properly recognized that the *Soo Line* decision should not be accorded any weight as a legal precedent because it "was decided before Congress amended and recodified §5(2)(f) in 1976 and 1978." (632 F.2d at 412, n.50, 39a). In view of the absence of any conflict in decisions, the unambiguous legislative history of the statute and its settled construction, there is absolutely no reason for this Court to review this issue.

B. The Court of Appeals Properly Found that the Commission Fully Discharged Its Statutory Mandate under Section 11344 to Consider the Interest of Carrier Employees Affected by the Transaction.

RLEA contended before the Court of Appeals that §11344(b)(4) requires that Commission to consider the "interest of the carrier

employees affected by the proposed transaction" as an element of the public interest before it decides whether a merger is "consistent with the public interest." (Br., p. 14) RLEA contended that the Commission's consideration of the impact of the merger on railroad employees did not occur in proper sequential order because the Commission's discussion of this subject at pp. 946-950 of its decision follows the statement that "we have decided to approve the merger." *Id.* at 946. In categorically rejecting this argument, the Court of Appeals correctly found that "Section 11344 is not intended to dictate a procedural order for the Commission's considerations," and, hence, that the Commission's "thorough discussion of the effect of the merger on employees fulfilled all the statutory requirements." (632 F.2d at 412-413, 40a).

RLEA now contends that "when it [the Commission] considered the impact of the proposed transaction upon non-applicant carriers' employees, the ICC examined it solely with the question of whether Section 11347 of the Act required the imposition of protections." (RLEA Pet., p. 16) According to RLEA, this approach "effectively deprived other carrier employees of a fair hearing on this issue." (Pet., p. 17)

Since both 49 U.S.C. §11344(b)(4) and §11347 refer to the interests of "employees affected" by a proposed transaction, it would seem indisputable that the Commission's conclusion that employees of competing carriers are not entitled to protection under §11347 also fixes the scope of the identical phrase in §11344(b)(4). This issue, however, is not raised by this case because the Commission did consider the interests of all carrier employees and it discussed and evaluated the impact on such employees in the process of determining that the proposed merger was consistent with the public interest.

Thus, as the Court of Appeals noted (632 F.2d at 412-413, 40a), the Commission on its own initiative conducted a comprehensive analysis of the impact of this merger on all railroad employees by sending out detailed questionnaires to the fourteen carriers who might be conceivably affected by the merger. In response to the questions posed by the Commission, ten of these re-

sponded that the merger will have *no* adverse impact on their employees.[28] Four stated that there might be some adverse impact: Rock Island, Milwaukee, Katy and Illinois Central Gulf: 360 I.C.C. at 860; 848-9; 872; and 881 (78a; 66a-67a; 90a; 99a). The Rock Island, of course, is currently being liquidated, and is no longer an operating carrier. The suggestion that its employees might be adversely affected by the merger is thus sheer fantasy. The same is true of the Milwaukee which is in the process of liquidation and restructuring. Moreover, Congress has specifically provided in separate recent legislation for comprehensive protective benefits for employees of both carriers. (Public Law 96-265, 94 Stat. 399; 45 U.S.C. §907-14). It cannot be argued, therefore, that consummation of this merger will adversely affect these employees.

The remaining two carriers (Katy and ICG) stated that it would be difficult, if not impossible, to identify employees affected by the merger. Katy claimed a possible impact on only 37 employees but admitted that even this would be "mitigated by attrition." (360 I.C.C. at 872, 90a). ICG stated that the adverse impact could not be "precisely defined" because any decision to cut back is the result of "numerous variables besides the proposed merger." (360 I.C.C. at 881, 99a). After reviewing this evidence, the Court of Appeals properly found "that this investigation and the Commission's thorough discussion of the effect of the merger on employees fulfilled all the statutory requirements." (632 F.2d at 412-413, 40a). RLEA's assertion that the Commission did not examine the interests of carrier employees in its decision to approve the merger is, therefore, totally refuted by the facts.

Because the evidence of record demonstrates that employees of competing carriers will not be adversely affected by this merger, RLEA's recently-contrived recitation of issues the Commission should have considered in its discussion of this issue is plainly irrelevant. Thus, RLEA complains that the Commission did not determine "if it would be consistent with the public interest to

[28]Denver & Rio Grande Western; Soo Line; Union Pacific Railroad; Chicago and North Western; Kansas City Southern; Atchison, Topeka and Santa Fe; Family Lines; Southern Pacific; Southern and Missouri Pacific. 360 I.C.C. at 908, 897, 915; 912; 909; 911; 913; 911; and 908 (126a; 115a; 133; 130a; 127a; 129a; 131a; 129a; 126a).

authorize a transaction which would cause employees of other rail carriers to bear unaided the burden of the BN-Frisco's profits." (Pet., p. 16) Obviously, such a determination is not required where the evidence demonstrates no such adverse labor impact. The same is true of RLEA's other criticism—that the Commission did not determine whether "it should impose certain provisions to aid those affected rail employees, such as a requirement that furloughed non-applicant employees be given priority of employment with the merged carrier." (*Id.*) Moreover, contrary to RLEA's claim, it was not "denied a fair hearing on this issue," (Pet., p. 17), but instead elected not to present any affirmative evidence of its own regarding the merger's impact on employees of competing carriers. Having taken this position, RLEA cannot now criticize the extensive evidence produced by the Commission itself on this issue.

It is clear, therefore, that the Commission fully addressed "the interest of carrier employees affected by the proposed transaction" in accordance with the requirements of 49 U.S.C. §11344(b)(4).

CONCLUSION

For the foregoing reasons, the various petitions for certiorari should be denied.

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April 24, 1981

APR 30 1981

Nos. 80-1434, 80-1439, and 80-1632

In the Supreme Court of the United States

OCTOBER TERM, 1980

MISSOURI—KANSAS—TEXAS RAILROAD COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may decline to prohibit or condition a rail merger that promises substantial public benefits where it determines that essential services to the public will not be lost.

2. Whether substantial evidence supported the Commission's refusal to impose special protective conditions, in addition to those actually imposed, for the benefit of a railroad not a party to the proposed merger.

3. Whether the Commission's invocation and application of concededly valid, but new, policies against imposing certain conditions on rail mergers denied due process to a railroad not a party to the merger that would have been benefited by such conditions.

4. Whether the Commission and the court of appeals correctly concluded that the employee protection provisions of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 11347, require protection only for the employees of the merging railroads.

5. Whether the Commission's imposition of extensive conditions for the protection of the employees of the merging railroads satisfied its obligation to consider the interests of rail laborers in evaluating the proposed merger.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A85)[1] is reported at 632 F.2d 392. The opinion of the Interstate Commerce Commission (Pet. App. A86–A485) is reported at 360 I.C.C. 784.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1980. The petitions for a writ of certiorari were filed on Monday, February 23, 1981. The cross-petition for a writ of certiorari (No. 80–1632) was filed on March 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1977, Burlington Northern, Inc. (BN) and the St. Louis-San Francisco Railway Company (Frisco) agreed to merge. BN and Frisco applied to the Interstate Commerce Commission for authority to consummate the merger, as required by 49 U.S.C. (Supp. III) 11343. Petitioners Missouri-Kansas-Texas Railroad Company (Katy) and Railway Labor Executives' Association (RLEA) and the Illinois cross-petitioners were among the 33 parties who participated in the ensuing Commission proceeding.[2]

Petitioner Katy urged the Commission to deny the merger application (Pet. App. A167–A168). In the

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[1] "Pet. App." refers to the appendix to the petition in No. 80–1434.

[2] Fourteen other railroads, three government agencies (including the United States Department of Justice), and two other labor organizations also participated (Pet. App. A94–A95). In addition, the record included the verified statements of 26 shippers (*id.* at A274–A283). The Commission proceeding lasted almost two and one half years, involved 46 days of oral hearing and generated a record comprising 8370 pages (*id.* at A96).

alternative, petitioner Katy requested that BN/Frisco be required to idemnify Katy, through 1997, for any loss of net income resulting from diversion of traffic to the merged system (*id.* at A175–A176, A464–A465). Petitioner Katy also requested imposition of permanent conditions to insure continuing Katy participation in joint-line traffic with BN and Frisco (*id.* at A177, A465–A466).[3] Petitioner RLEA asked the Commission either to deny the merger or to approve it with conditions for the protection of railroad employees (*id.* at A228–A230). Petitioner RLEA requested that protection not be confined to employees of BN and Frisco, but be extended to the employees of any carriers affected by the merger (*id.* at A229). The Illinois cross-petitioners noted several concerns as to the effect of the proposed merger on rail service in that state.

The Commission carefully reviewed the proposed merger. As required by 49 U.S.C. (Supp. III) 11344(b), the Commission examined the merger's effect on the adequacy of transportation for the public, the effect of including other railroads, the total fixed charges that would result, and the interests of affected employees (Pet. App. A234, A238–A244, A247, A249–A253). The Commission took into account the National Transportation Policy, 49 U.S.C. (Supp. III) 10101, and considered the merger's impact on competition and on the environment (*id.* at A235, A244–A249). In this merger proceeding, the Commission applied, for the first time, the policy on railroad mergers it had announced in *Railroad Consolidation Procedures*, 359 I.C.C. 195, 199 (1978) (Pet. App. A236). That policy statement detailed the host of criteria the Commission considers when deciding whether a railroad merger is consistent with the public interest. One of the relevant factors is whether essential

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[3] Joint-line traffic is traffic handled by more than one railroad.

rail services will continue to be provided, by either the consolidating companies or other railroads that may be affected by the merger.[4] In its decision approving the BN/Frisco merger, the Commission also listed the criteria it will consider when deciding whether to condition its approval of a proposed merger (Pet. App. A254)[5] and remarked that no condition would be imposed unless it had been sought by a protestant (*ibid.*). The Commission also stated, for the first time, that it would not impose indemnity conditions "under any circumstances" (*id.* at A255–A256).

The Commission determined that the BN/Frisco merger, with certain conditions,[6] was consistent with the public interest (Pet. App. A238, A263). It found that the merger would bring substantial public benefits without loss of essential services (*id.* at A238–A242, A244) and would not diminish competition (*id.* at A244–A247). The

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[4] The other factors listed in the policy statement are:

> Whether the opportunities to achieve operating efficiencies will be increased; whether redundant facilities will be eliminated; whether the ability of the consolidated system to attract new business will be enhanced; whether the consolidated company will be financially viable; whether effective inter- and intramodal competition will be maintained wherever economic realities make it possible; and whether there will be any adverse impact on the environment of the region served.

359 I.C.C. at 199.

[5] The Commission stated (Pet. App. A254):

> We do not believe that a merger should be conditioned unless essential services have been shown to be affected and the condition: (1) is shown to be related to the impact of the merger * * *; (2) is to enable shippers to receive adequate service; (3) will not provide a windfall to the carrier; (4) would not pose operating or other problems for the newly merged company; and (5) would not frustrate the ability of the merged company to carry out its objectives.

[6] See pages 5–6, *infra*.

Commission approved the labor protection agreements negotiated by BN and Frisco with the representatives of their employees (*id.* at A250–A251) and imposed the "*New York Dock* Conditions" for the protection of those employees of BN and Frisco who did not enter into negotiated agreements prior to the merger's consummation (*id.* at A250).[7]

Among the conditions imposed by the Commission for the benefit of railroads not participating in the merger were the so-called "DT&I Conditions," which ensure that a merged railroad (1) will continue to handle the interconnecting traffic of other railroads with the same neutrality as before the merger, rather than favoring its new partner at the expense of another railroad, and (2) will not eliminate routes or rates previously maintained with a competing railroad without the Commission's approval (Pet. App. A22, A260, A482–A483).[8] The DT&I Conditions were imposed for the period of two years, but the Commission retained jurisdiction to modify or extend them upon a showing by any party that the public interest would be served thereby (*id.* at A260, A483).[9] The Commission denied petitioner Katy's re-

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[7] The "*New York Dock* Conditions" were developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, aff'd, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[8] The "DT&I Conditions" take their name from the first case in which they were imposed, *Detroit, Toledo & Ironton R.R.—Control*, 275 I.C.C. 455 (1950).

[9] The Commission also imposed, for a period of two years, certain conditions negotiated between the merging railroads and the Kansas City Southern Railway Company, Southern Railway System, Southern Pacific Transportation Company, Union Pacific Railroad Company, and Chicago and Northwestern Transportation Company (Pet. App. A260–A261). The Commission declined, however, to impose some of the conditions agreed to by the BN/Frisco and the Southern Pacific Transportation Company (*id.* at A260).

quests for additional special conditions because its indemnity proposal was unacceptable in principle and because the Commission concluded that the losses the merger would impose on Katy would not impair Katy's ability to render essential services (*id.* at A256, A257–A258). Like the other railroad protestants, however, petitioner Katy received the benefit of the "DT&I Conditions" for two years following consummation of the merger.

The Commission rejected petitioner RLEA's request for protection for the employees of railroads other than BN and Frisco, concluding that 49 U.S.C. (Supp. III) 11347 does not require imposition of such conditions (Pet. App. A252–A253).

2. The court of appeals affirmed the Commission's decision in all respects (Pet. App. A1–A85).[10] The court concluded that the Commission's use of the "essential services" standard to determine whether to approve the merger or impose protective conditions was "perfectly appropriate under [49 U.S.C. (Supp. III)] § 11344(b)(1) and any of the other broad statutory standards" (Pet. App. A40). The court observed that the Commission's new policy reflected exactly the kind of sensitive reevaluation of the public interest Congress intended the Commission to undertake and that the Commission had adequately explained its departure from prior policy (*id.* at A28–A44).

The court of appeals rejected contentions that the Commission's imposition of "DT&I Conditions" for only two years following consummation of the merger undercut the adequacy of the evidence supporting approval of the merger (Pet. App. A50). Moreover, the court noted that the only possible impact of the initial decision to

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[10] In addition to the petitioners and cross-petitioners herein, Soo Line Railroad Company and the Kansas City Board of Trade sought judicial review (Pet. App. A4).

limit the "DT&I Conditions" to two years might be upon any subsequent review of the need for extending the life of conditions to protect competing carriers (*id.* at A51–A52). Inasmuch as the Commission's continuing jurisdiction and independent authority under the Interstate Commerce Act provide the Commission with complete authority to respond to meritorious claims for protection from any affected carrier, the court found that imposing "DT&I Conditions" for only two years did not undermine the Commission's ability to project competing carriers' needs for additional protection (*id.* at A57–A58).

Turning to petitioner Katy's request for special conditions, the court of appeals found ample evidence to support the Commission's finding that Katy could survive the merger without losing its ability to render "essential services" (Pet. App. A61–A63). The court also rejected petitioner Katy's argument that the Commission's application of the new policies against indemnity and unrequested conditions denied Katy due process (*id.* at A65–A72). The court found that the Commission adequately explained both policies and that petitioner Katy's reliance on indemnity was misplaced (*id.* at A67–A71).[11] Moreover, even if not misplaced, petitioner Katy's reliance on indemnity did not impose substantial adverse consequences because Katy may petition the Commission in the future for additional protective conditions (*id.* at A71).

Regarding employee protection, the court of appeals held that the language of 49 U.S.C. (Supp. III) 11347, the applicable legislative history, and Congress' implicit approval of the Commission's policy on employee protec-

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[11] The Commission's finding that petitioner Katy needed no special protective conditions led the court of appeals to question whether the Commission had even applied the new policies against indemnity and unrequested conditions in this case (Pet. App. A66, A70–A71).

tion established the correctness of the Commission's view that Section 11347 requires protection only for the employees of the merging carriers (Pet. App. A74–A81). The court also rejected petitioner RLEA's contention that the Commission's decision considered the issue of employee protection in the wrong sequence (*id.* at A81–A83).

ARGUMENT

The careful opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's decision to approve the merger of BN and Frisco without imposing the additional traffic protection conditions sought by petitioner Katy or the additional employee protection conditions sought by petitioner RLEA. This case rests largely on its own particular facts and presents no conflict with the decisions of this Court or any other court of appeals.[12] Further review is not warranted.

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[12] The United States Court of Appeals for the Fourth Circuit recently reviewed the Commission's approval of a proposed railroad control transaction in *Norfolk & W. Ry.* v. *United States*, 639 F.2d 1096 (1981). In that proceeding the Commission had determined that no "DT&I Conditions" should be imposed, without affording the parties an opportunity to adduce evidence to demonstrate that they were needed. The court of appeals affirmed the Commission's approval of the transaction itself, but remanded the case to the Commission to permit competing railroads to make an evidentiary showing on the need to impose "DT&I Conditions" for their benefit.

No petitioner herein suggests that the Commission's decision to impose "DT&I Conditions" for only two years was error justifying review by this Court. Petitioner Katy's arguments with respect to the two-year imposition of "DT&I Conditions" are confined to the limitation's effect on the probative value of the evidence supporting the Commission's conclusion that petitioner Katy requires no additional protection (Pet. 48). Thus, the issue upon which the court of appeals in *Norfolk & W. Ry.* remanded is not raised in this Court. In any event, the decisions of the two courts of appeals are not in conflict because both recognized that

1. Petitioner Katy and the Illinois cross-petitioners principally contend that the court of appeals erroneously held that the Commission's "essential services" standard is consistent with the statutory guidelines applicable to the BN/Frisco merger. Petitioner Katy argues (Pet. 32–33) that use of the "essential services" standard to determine whether to protect railroads adversely affected by a merger violates the National Transportation Policy, 49 U.S.C. (Supp. III) 10101, and amounts to use of an invidious "double standard." Cross-petitioners argue (80–1632 Pet. 8) that, because the "essential services" standard applies to mergers prosecuted under 49 U.S.C. (Supp. III) 11346, it was error to apply the standard to the BN/Frisco merger, which was governed by 49 U.S.C. (Supp. III) 11344. These contentions are insubstantial.

The Interstate Commerce Act establishes the following standard for approval of a proposed merger: "The Commission shall approve [a merger] * * * when it finds the transaction is consistent with the public interest." 49 U.S.C. (Supp. III) 11344(c). In its proceedings the Commission is directed to consider the four factors set out in 49 U.S.C. (Supp. III) 11344(b), and the policies of the antitrust laws. *United States* v. *ICC*, 396 U.S. 491, 504 (1970). How these factors are balanced, however, is for the Commission to determine. *Penn-Central Merger Cases*, 389 U.S. 486, 498–499 (1968); *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385 U.S. 57, 68–69 (1966). As the court of appeals observed (Pet. App. A35-A37), the "essential services" standard applied by the Commission is a permissible component of

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competing railroads must be given an opportunity to develop evidence on the need for "DT&I Conditions." In the BN/Frisco case, the Commission met that requirement by imposing "DT&I Conditions" for two years after consummation of the merger, permitting carriers to submit evidence on the need for extending the conditions (Pet. App. A57–A58).

the public interest review mandated by statute. It neither conflicts with the mandate to *consider* the "adequacy of transportation to the public," 49 U.S.C. (Supp. III) 11344(b)(1), nor impermissibly infuses any incompatible aspect of review of mergers subject to 49 U.S.C. (Supp. III) 11346 into the review process (Pet. App. A35-A40).[13]

Petitioner Katy's suggestion (Pet. 27) that the Commission employed an impermissible "double standard" is frivolous. Rather, the Commission has simply exercised its authority to assess the public interest, *Penn-Central Merger Cases*, *supra*, 389 U.S. at 499, by specifying an operational criterion applicable to all affected parties in an even-handed manner. In reality, the thrust of Katy's complaint is that the Commission's "essential services" standard focuses upon the "*public* interest," 49 U.S.C. (Supp. III) 11344(c), and the "adequacy of transportation to the *public*," 49 U.S.C. (Supp. III) 11344(b)(1) (emphasis added), rather than upon the welfare of particular corporate entities (see Pet. App. A255); *Railroad Consolidation Procedures*, 359 I.C.C. 195, 199–200 (1978). In past railroad merger proceedings, the Commission's balancing of public interest factors led it to deny or condition a merger if any competing railroad would be harmed by the transactions. See, *e.g.*, *Chicago & N.W.—Control*, 347 I.C.C. 556 (1974); *Illinois Central Gulf R.R.*—

[13] Because the BN/Frisco merger was decided under 49 U.S.C. (Supp. III) 11344, and because the "essential services" standard is an appropriate analytical tool for use in judging mergers governed by that provision, it is irrelevant whether the "essential services" standard may also be used to determine the public interest under the more lenient procedures of 49 U.S.C. (Supp. III) 11346. Accordingly, there is no merit to cross-petitioners' contention (80–1632 Pet. 10) that the court of appeals erroneously "lifted" the "essential services" standard from 49 U.S.C. (Supp. III) 11346. See Pet. App. A35-A36 & nn.24, 25.

Acquisition—Gulf M. & O., 338 I.C.C. 805 (1971); *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475 (1966). In the BN/Frisco proceeding, however, the Commission applied the new balancing of the public interest factors announced in 1978, *Railroad Consolidation Procedures*, *supra*, 359 I.C.C. at 199–200,[14] under which the Commission will not deny or condition a merger offering substantial benefits to the public unless the public would otherwise lose "essential services" (Pet. App. A39-A40).

Petitioner Katy has cited no authority to support its contention that the Commission must continue balancing the public interest factors in the same way it has in the past.[15] Indeed, this Court's decisions fully support the Commission's decision to adopt a view of the public interest different from that held in the past. As the court of appeals noted (Pet. App. A40), the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). The Commission's determination that the public will be better served if competing railroads are less shielded from the effects of the competition offered by strong merged carriers is consistent with this Court's view of the Commission's broad discretion under the statutory guidelines. *Penn-Central Merger Cases*, *supra*, 389 U.S. at 498–499.[16]

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[14] This policy was first published in proposed form, providing for consideration of comments from interested parties, at 43 Fed. Reg. 15753 (1978).

[15] Petitioner Katy asserts instead (Pet. 32–33) that, in using the "essential services" standard, the Commission ignored the National Transportation Policy. This assertion is without foundation for the reasons stated by the court of appeals (Pet. App. A38-A39).

[16] Petitioner Katy erroneously urges (Pet. 19–23) that the court of appeals erred by permitting the Commission to approve

2. Petitioner Katy also contends (Pet. 34–53) that there is no substantial evidence to support the Commission's finding that (1) petitioner Katy can survive the expected annual loss of $8.75 million in gross revenues and (2) the gross annual revenue losses will not exceed $8.75 million. These factual contentions were correctly rejected by the court of appeals.

a. In its proceeding, the Commission carefully analyzed the evidence concerning petitioner Katy to determine if the merger's expected effect on that railroad required disapproval of the merger or special protective

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the proposed merger without considering, as 49 U.S.C. (Supp. III) 11344(b)(1) requires, the merger's effect on adequacy of transportation. The court of appeals clearly recognized that the statute mandates consideration of the adequacy of transportation (Pet. App. A5-A6, A20) and the Commission extensively considered that factor (*id.* at A238-A244). Nor is there any merit to petitioner Katy's claim (Pet. 19–23) that either the Commission or the court of appeals impermissibly bifurcated its inquiry. The Commission's ultimate conclusion that the merger is consistent with the public interest rested, *inter alia*, on the conditions it imposed (*id.* at A263). And the court of appeals plainly recognized that that ultimate conclusion rested upon "subsidiary findings, conclusions, and orders of the Commission" challenged by petitioner Katy (*id.* at A24).

The Illinois cross-petitioners' contention (80–1632 Pet. 10–11) that the Commission inadequately analyzed the competitive impact of the merger because it made no specific findings respecting the alleged tendency of the BN/Frisco merger to induce other mergers in the future is groundless. As the court of appeals noted (Pet. App. A73), the Commission concluded that the merger would not diminish competition, and the cross-petitioners have not argued that that conclusion is incorrect. At root, the cross-petitioners' challenge is to the agency's decision to structure its proceedings and render its decisions in the usual case by case fashion. No statute commands adoption of the approach urged by cross-petitioners, and hence judicial interference with such administrative prerogatives is inappropriate. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543, 548 (1978); *Steadman* v. *SEC*, No. 79–1266 (Feb. 25, 1981), slip op. 13.

conditions (Pet. App. A167-A178, A386-A394). The Commission concluded (*id.* at A257–A258, A260) that imposition of "DT&I Conditions" for two years following consummation of the merger would adequately protect petitioner Katy. Given these facts, the court of appeals correctly rejected (*id.* at A60-A64) petitioner Katy's claim that the Commission had misjudged the railroad's prospects. Consistent with this Court's decisions in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *United States* v. *ICC*, 396 U.S. 491, 516 (1970); and *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28–29 (1961), the court of appeals held (Pet. App. A60) that the Commission was not required to make specific findings in the course of making future projections. But the court of appeals also found (*id.* at A61) that the Commission's decision was in fact supported by "very reliable evidence"[17] and that, in any event, petitioner Katy has a complete remedy if the Commission's projections prove to be wrong (*id.* at A63-A64). Hence, there is no reason for this Court to reweigh evidence that the court of appeals has already closely examined. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

b. The Commission's determination of the merger's effect on petitioner Katy was necessarily a prediction of uncertain events. In such circumstances, complete factual support for the Commission's prediction is not required because "'a forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814, quoting *FPC* v. *Transcontinen-*

[17] The evidence offered by petitioner Katy's own witnesses before the agency supported the Commission's conclusion (Pet. App. A62).

tal Gas Pipe Line Corp., *supra*, 365 U.S. at 29. The court of appeals found (Pet. App. A49), and petitioner Katy does not seriously challenge, that the Commision had reliable evidence to support its conclusions on the merger's effects during the first two years after consummation. This evidence clearly indicated that petitioner Katy could survive the merger without the special protective conditions it requested. As to subsequent years, the court of appeals noted (*id.* at A55) that petitioner Katy can reduce diversions by responding competitively to the new competition from BN/Frisco. The court also found (*id.* at A46, A54) that the Interstate Commerce Act provides petitioner Katy with most of the protection offered by the "DT&I Conditions." The Commission thus preserved petitioner Katy's opportunity to demonstrate the need for additional conditions based upon actual, instead of predicted, facts. Given these circumstances, the court of appeals correctly held (*id.* at A56-A57) that the Commission had an adequate basis to gauge petitioner Katy's economic future and need for protective conditions. Petitioner Katy's demand for additional protection rests, in the final analysis, upon the view that the Interstate Commerce Act grants it perpetual rights to maintain its existing level of traffic, irrespective of whether competing carriers offer more attractive service to the public. There is no basis in the statute for such insulation from the competitive pressures of the market.

3. Petitioner Katy's final contention (Pet. 54–64) is that the Commission's application of new, but concededly valid, policies restricting imposition of unrequested conditions and indemnity conditions worked a denial of due process. The court of appeals found (Pet. App. A70-A71), however, that the Commission had not applied the new policies to petitioner Katy because the Commission's denial of the requested protective condi-

tions rested on the finding that petitioner did not need the conditions. Despite its protestations, petitioner Katy effectively acknowledges (Pet. 59 n.18) that application of the new policies was not essential to the Commission's decision to deny the special protective conditions. Accordingly, there is no occasion for this Court to consider whether the Commission's practice was in any respect unlawful.[18]

Even if the Commission's decision rested solely on the new policies, no error was committed. This Court has repeatedly held that an agency may formulate and apply policies in adjudications, as long as the agency's action comports with basic fairness. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292–294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202–204 (1947). The court of appeals correctly found (Pet. App. A70-A71) that the balance of equities did not favor petitioner Katy. Petitioner Katy had no reasonable basis to believe that the Commission would accept its indemnity request, which would have imposed an unprecedented burden on the merged company. The Commission had imposed indemnity conditions only twice in its entire history, and then only in extraordinary circumstances involving a clear showing that protection was necessary (*id.* at A71).[19] Here, petitioner Katy failed to make a compelling showing that it needed protection.

In any event, the court of appeals correctly observed (Pet. App. A71) that the Commission's refusal to grant

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[18] Petitioner Katy has never identified any unrequested condition that should have been considered. Moreover, contrary to petitioner Katy's suggestion (Pet. 54), Katy did obtain protective relief in the form of imposition of the "DT&I Conditions."

[19] *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 532 (1966) (indemnity imposed during pendency of further proceedings); and *Chicago & N.W. Ry.—Control*, 347 I.C.C. 556, 634–637 (1974) (indemnity imposed "to a limited extent [5 years] and as a last resort").

that condition did not substantially and adversely affect petitioner because the Commission gave petitioner the benefit of "DT&I Conditions" for two years and the right to seek such further protection as it could justify. See *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 295. Thus, there is no merit to petitioner Katy's argument that the court of appeals has sanctioned unfair retroactive application of an administrative regulation. On the contrary, it is petitioner Katy that would unreasonably freeze the evolution of the Commission's policy and procedures by perpetuating application of burdensome conditions unrelated to the public interest far into the future.

4. Petitioner RLEA's principal contention (80–1439 Pet. 9–15) is that, pursuant to 49 U.S.C. (Supp. III) 11347, the Commission was obliged to condition approval of the merger upon implementation of conditions to protect the jobs of employees of railroads affected by, but not parties to, the merger. The contrary ruling of the Commission (Pet. App. A251-A253) and the court of appeals (*id.* at A75-A81) is not inconsistent with any decision of this Court or any other court of appeals and is supported by the weight of district court authority.[20] See *Florida East Coast Ry.* v. *United States*, 259 F.Supp. 993, 1019 (M.D. Fla. 1966), dismissed as moot, 386 U.S. 544 (1967); *Railway Labor Executives' Ass'n* v. *United States*, 226 F. Supp. 521, 525 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964). Petitioner RLEA relies instead on the contrary decision in *Soo Line R.R.* v. *United States*, 280 F. Supp. 907 (D. Minn.

[20] The decision below is the first to address the question of the scope of labor protection mandated by 49 U.S.C. (Supp. III) 11347 since the shift in jurisdiction to review Commission orders from three-judge district courts to the courts of appeals in 1975. See Pub. L. No. 93–584, 88 Stat. 1917. Should another court of appeals reach a different result in subsequent litigation, there will be time enough for this Court to consider whether further review is warranted.

1968), which interprets the words "railroad employees" in 49 U.S.C. (Supp. III) 11347 to encompass all employees of any railroad affected by a merger, rather than merely the employees of the merging carriers and their subsidiaries.[21] But the decision below is more faithful to the statute than is the district court's decision in *Soo Line*.

As the court of appeals noted (Pet. App. A81 n.50), the *Soo Line* court erred by failing to consider the complete text of Section 11347, or its predecessor, 49 U.S.C. (1970 ed.) 5(2)(f). The second sentence of Section 11347 provides that protective arrangements "may be made by the rail carrier and the authorized representative of its employees," instead of by the Commission. The court of appeals observed (Pet. App. A77-A78):

> It is difficult to imagine that when Congress wrote this sentence it was contemplating that a nonmerging carrier would agree to protect its employees from the merger of two competing carriers.

The court thus concluded that the Commission had properly inferred that the first sentence of Section 11347, which prescribes the imposition of conditions by the Commission, had coordinate scope (*id.* at A78, A80).

Petitioner RLEA's suggestion (80–1439 Pet. 13–15) that the court of appeals was led astray by consulting the 1978 recodification of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 11347, instead of the former 49 U.S.C. 5(2)(f), is unfounded. The concluding sentence of the earlier text, cited by petitioner RLEA (80–1439

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[21] Contrary to petitioner RLEA's implication (80–1439 Pet. 7 n.3), *Railway Labor Executives' Ass'n* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963), does not support petitioner's position, but rests, as the court of appeals noted (Pet. App. A76 n.46), on the special facts of that case.

Pet. 14) suggested, just as the present version does, that protective conditions are to be limited to the employees of the merging carriers. Petitioner's observation that the 1978 recodification was intended to work no substantive change undercuts its own contention, because the plain indication of congressional intent embodied in the recodified statute serves to clarify the ambiguity that petitioner struggles to introduce into the earlier version of the statute.

Contrary to petitioner RLEA's contentions (80–1439 Pet. 12–13), Congress made no changes in the former 49 U.S.C. 5(2)(f) in 1976, when it amended the Interstate Commerce Act,[22] or in the 1972 amendment to the Rail Passenger Service Act, 45 U.S.C. 565, that in any way suggest that protection was to be extended to employees of non-merging carriers. First, Section 11347 and its predecessor, Section 5(2)(f), incorporate by reference only the level of protection afforded by 45 U.S.C. 565 and not the definition of employees covered. In any event, the 1972 amendment extended protection under the Rail Passenger Service Act only to employees of "terminal companies" and not to the employees of non-merging railroads. Finally, the labor protection conditions imposed by the Commission in this proceeding were those developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 89 (1979), which include the provision for coverage of employees of independently incorporated terminal companies derived from "Appendix C-1, Article III," the standard labor protection conditions imposed under the amended Rail Passenger Service Act. *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 86–91.

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[22] Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 62.

Accordingly, the Commission fully complied with the mandate of 49 U.S.C. (Supp. III) 11347.[23]

The Commission has consistently interpreted 49 U.S.C. (Supp. III) 11347 and its predecessor as requiring protection only for employees of the merging carriers (see Pet. App. A75 & n.44). This longstanding administrative interpretation is entitled to substantial deference, as the court of appeals recognized. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This is especially so where, as here, Congress has re-enacted the statute without pertinent change. *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 275. Accordingly, absent a conflict among the circuits, there is no warrant for further review on this point.

5. Petitioner RLEA also contends (80–1439 Pet. 15–18) that it was impermissible for the Commission to discuss conditions to be imposed for the benefit of employees (Pet. App. A249-A253) *after* having discussed other aspects of the merits of the merger application. But, as the court of appeals observed (*id.* at A82-A83), 49 U.S.C. (Supp. III) 11344(b) does not require the Commission to follow any particular order in considering the various factors that figure in its overall assessment of the public interest. Accordingly, the court of appeals properly refrained from imposing upon the Commission its own notions, or petitioner's notions, of how the discussion ought to be structured. *Vermont*

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[23] In any event, the independently incorporated terminal companies covered by Article III of Appendix C-1 are only those wholly or partially owned by merger applicants. Such employees, Congress evidently believed, are entitled to protection as though they were technically employees of a merging carrier, irrespective of the device of separate incorporation. Accordingly, the inclusion of terminal company employees within the labor protection mandate of the Act provides no support for extending such benefits to employees of wholly independent carriers.

Yankee Nuclear Power Corp. v. *NRDC*, *supra*, 435 U.S. at 543, 548.

In any event, as the court of appeals noted (Pet. App. A83 n.52), the Commission did review the impact of the merger on railway employees prior to stating its approval of the merger itself (see, *e.g.*, *id.* at A175, A184, A200). And the Commission's ultimate finding that the merger was in the public interest explicitly rested upon the conditions imposed, including the labor protection conditions (*id.* at A263, A482, A485). The Commission's decision was based upon a careful examination of the effect of the merger on all employees, which revealed that there was no factual reason to block the merger or impose additional conditions for the protection of employees (*id.* at A82-A83). Hence, there is no support for petitioner RLEA's assertion that the Commission violated Section 11344(b)(4) by failing to consider the "interest of carrier employees affected" by the merger.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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